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No. 200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

THE UNITED STATES OF AMERICA, *Appellant*

v.

SISAL SALES CORPORATION, *et al.*

Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLEES, SISAL SALES CORPORATION, FREDERICK T. WALKER, LYNN H. DINKINS, F. W. BLACK, J. A. BEATSON, THE EQUITABLE TRUST COMPANY OF NEW YORK, THE ROYAL BANK OF CANADA, INTERSTATE TRUST AND BANKING COMPANY and COMISION EXPORTADORA de YUCATAN.

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October Term, 1926

No. 200

THE UNITED STATES OF AMERICA, *Appellant*

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SISAL SALES CORPORATION, *et al.*

On Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLEES, SISAL SALES CORPORATION, FREDERICK T. WALKER, LYNN H. DINKINS, F. W. BLACK, J. A. BEATSON, THE EQUITABLE TRUST COMPANY OF NEW YORK, THE ROYAL BANK OF CANADA, INTERSTATE TRUST AND BANKING COMPANY and COMISION EXPORTADORA de YUCATAN.

The Opinion of the Court Below.

The opinion of the District Court, by District Judge Augustus N. Hand, granting the motions of defendants to dismiss the petition in the present case, has not yet been

reported in the Federal Reporter. This opinion appears on pages 52-4 of the Transcript of Record and for convenience is herein set out as follows:

"This is a suit to restrain an alleged conspiracy by the defendants in violation of the Sherman Anti-trust Act and the Wilson Act.

"The conspiracy relied upon was to monopolize the export market to the United States in sisal, a product of Yucatan, extensively used for binder twine for agricultural purposes. It is unnecessary to determine whether an unlawful conspiracy was once formed. The original purpose of the agreements and transactions pleaded by the Government with which most of the parties defendant were connected was to enable the defendant banks to dispose of large quantities of sisal on which they had advanced money after the war. The complaint alleges that those stocks were disposed of some years ago.

"It is assumed that the defendants planned to advocate and obtained legislation in Yucatan giving the Comision Exportadora a monopoly and that the Eric Corporation which held the surplus stocks of the banks pooled its sisal with that of the Yucatan monopolistic corporation. These stocks were long ago disposed of and we have nothing left but the Comision Exportadora, and its selling agent in America, the Sisal Sales Corporation, to which the various defendant banks are lending money in aid of their financial operations.

"The question is whether the defendants now should be restrained from dealing with the Sisal Sales Corporation and its principal, Comision Exportadora de Yucatan, because the latter is a monopoly created by the Government of Yucatan and protected by such favorable and discriminatory tax laws of that State that it is enabled to control the American market and fix prices in sisal. I think it manifest from the decision of the Supreme Court in American Banana Co. *v.* United Fruit Company, 213 U. S. 347, that an agreement to procure monopolistic legislation in another

country cannot be treated as unlawful by our courts. The Government attempts to draw a distinction between the American Banana case because that was an action by an individual to recover treble damages for injuries arising out of a conspiracy to monopolize the banana trade. One of the wrongful acts consisted of a seizure by the Costa Rica Government of a banana plantation belonging to the American Banana Company, at the alleged instigation of the defendant United Fruit Company. The Supreme Court held the cause of action invalid and said 'a conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.'

"If acts 'permitted by the local law' could not be inquired into for the purpose of awarding damages to a person injured, I do not follow the reasoning which regards them as a basis for a suit by the Government to restrain the parties connected with them as conspirators. It is true enough that an act, in itself innocent, may be a step in carrying out an unlawful conspiracy, but when, as here, nothing remains of the conspiracy that is not dependent upon the claimed unlawfulness of such act the whole case must fall. An injunction to restrain dealings with the Comision Exportadora de Yucatan and the Sisal Sales Corporation would be quite futile, so far as the public interest is concerned. Anyone else could surely deal with them and the successors to the alleged unlawful conspirators would have to be at once treated as legitimate traders and go scatheless.

"The motion to dismiss is granted."

Grounds of Jurisdiction.

The order of the District Court dismissing the petition of the Government was entered on June 30, 1925 (R. 55).

On July 24, 1925, the Government filed its petition for an appeal to this court, which petition was allowed by order of the District Court entered on the same day (R. 57, 58).

The appeal to this court is authorized by the provisions of the Act of February 11, 1903, c. 544, § 2, 32 Stat. 823; as amended by Act of June 25, 1910, c. 428, § 1, 36 Stat. 854, and by Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167; and as confirmed by Section 238 of the Judicial Code (U. S. Code, § 345), as last amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 938.

Statement of the Case.

This is an appeal from an order of the District Court of the United States for the Southern District of New York, whereby motions of certain defendants to dismiss the petition of the Government were granted.

The petition of the Government was brought under Section 4 of the Sherman Anti-trust Act (Act of July 2, 1890, c. 647, 26 Stat. 209) and Section 74 of the Wilson Tariff Act (Act of August 27, 1894, c. 349, 28 Stat. 509, 570, as amended by the Act of February 12, 1913, c. 40, 37 Stat. 667). The petition prays for a decree restraining the defendants from carrying out an alleged combination, conspiracy, monopoly or agreement to restrain interstate and foreign trade and commerce in sisal, and from entering into or continuing any similar combination, conspiracy, monopoly or contracts, and from combining, conspiring or agreeing to restrain interstate and foreign trade and commerce in sisal, or to increase the price of sisal in the United States, and from monopolizing, attempting to monopolize or combining or conspiring to monopolize interstate and foreign trade and commerce in sisal.

The motions to dismiss the petition are based upon the following grounds (R. 51, 52):

> "I. The petition herein does not state facts sufficient to constitute a valid cause of action in equity against these defendants or any of them.
>
> "II. It appears on the face of the petition herein that said petition is wholly without equity.

"III. It appears on the face of the petition herein that it is impossible to adjudicate or make any judgment or decree in this action, except a judgment or decree dismissing the petition herein, without examining, inquiring into, and investigating the laws, proclamations, and decrees of independent and sovereign foreign States, to wit, the Republic of the United States of Mexico and the State of Yucatan, and without investigating, examining, inquiring into, passing upon, and judging the lawfulness, validity, or legality of said laws, proclamations, and decrees, and of acts done by or under the authority of such sovereign and independent States and the laws, proclamations, and decrees thereof."

Summary of Petition.

The petition of the Government is largely made up of allegations characterizing the acts of the defendants as a combination and conspiracy. These characterizations are reiterated again and again with the evident purpose of creating an atmosphere of distrust of the motives and purposes of the defendants. If these allegations are stripped away, however, an examination of the actual facts alleged in the petition will show that the action taken by the various defendants from time to time was not only lawful, but was actuated by motives entirely different from a desire to monopolize the commerce of the United States in sisal.

Articles I, II and III of the petition consist of preliminary allegations. In Article I the residences of all of the defendants and the official connections of the individual defendants are set forth (R. 1). Article II contains averments designed to show jurisdiction of the District Court (R. 2).

In Article III (R. 3) it is alleged that sisal is a fiber obtained from the henequen plant and is used mainly in the manufacture of binder twine, that Mexico is the only country in which sisal is produced in sufficient quantities to supply the needs of the United States, and that practi-

cally the entire output of Mexican sisal is produced in the State of Yucatan, which, with the small quantity produced in the neighboring state of Campeche, is exported through the port of Progreso, Yucatan, to the United States. It is also alleged that more than eighty per cent. of the binder twine used in the United States is made of sisal, and that the remainder is made from manila hemp produced in the Philippine Islands, an insignificant portion of binder twine being made of fibers imported from Java, Havana, German East Africa and New Zealand.

In an attempt to support the charge of conspiracy made against the various defendants, the petition of the Government, beginning with Article IV (R. 4), goes into the history of the sisal business as far back as the year 1915, prior to which time it is alleged that sisal was sold to manufacturers of binder twine in the United States under conditions of competition.

Before analyzing in detail these allegations, it may be helpful to consider the following brief summary of the allegations of the petition concerning the existence of a closed or open market for sisal in Yucatan during the period from 1915 onward and concerning the reasons for the various open and closed markets, respectively.

Prior to 1915—	an open market existed (R. 4).
From latter part of 1915 to August 1919—	the market was closed through the operations of the old Comision Reguladora del Mercado de Henequen (R. 7) which collapsed in or about August 1919 (R. 8).
From August 1919 to March 19, 1921—	an open market existed (R. 8, 10, 11).
From March 19, 1921 to August 23, 1921—	the market was closed by passage on March 19, 1921, of a decree of the Mexican Government imposing a discriminatory export tax in favor of Comision Monetaria, which tax

	was repealed on August 23, 1921 (R. 11).
From August 23, 1921 to March 7, 1922—	an open market existed (R. 11, 19).
From March 7, 1922 to date of filing of the petition, June 24, 1924—	a closed market existed in Yucatan through the imposition by a law of the State Government of Yucatan of a discriminatory tax in favor of the Comision Exportadora de Yucatan (R. 19 *et seq.*).

It will be noticed from the above statement that during the nine years intervening between 1915 and the time of the filing of the petition, the market for sisal in Yucatan was closed to buyers other than corporations created either by the Government of Yucatan or by the Government of the United States of Mexico for the purpose of regulating the sisal market, during a period of approximately six and one-half years, and was open during a period approximately two and one-half years only.

Of the three periods during which a closed market existed, the first, as stated by Judge Hough in *United States* v. *Pan American Commission*, 261 Fed. 229, at page 232, was brought about by the power of General Alvarado, the dictator under General Carranza of the State of Yucatan; the second was created by a preferential tax imposed by the government of the United States of Mexico; and the third, which was the one in existence at the time of the filing of the petition of the Government, was brought about by the enactment of a preferential tax law by the State of Yucatan.

Article IV of the petition is entitled "First Successful Monopolization of Trade and Commerce in Sisal in the United States" (R. 4).

The transactions referred to in this Article are utterly immaterial as far as the situation existing at the time of the filing of the petition is concerned. The only one of the

present defendants who is alleged to have had any connection with the facts set forth in Article IV is Lynn H. Dinkins. There is set forth in this Article an alleged attempt upon the part of Dinkins and one Wexler and the Comision Reguladora, an institution created under the laws of the State of Yucatan, to monopolize the sisal output of Mexico through an agreement dated November 13, 1915. It appears on the face of the petition that this alleged attempt at monopoly broke down in 1917.

That none of the facts referred to in Article IV of the petition had any further significance at the time of the filing of the petition is made clear by the following allegation (R. 7):

> "In 1917 the Mexican interests no longer requiring the services of the Pan American Commission Corporation to borrow money, repudiated the contract of November 13, 1913 as modified. A suit brought against that Company, Comision Reguladora and others under the Anti-Trust laws, was dismissed without prejudice for want of actuality."

The suit thus casually referred to in the Government's petition is the case of the *United States* v. *Pan American Commission* (*supra*). In that case it appears that the Government brought a bill in equity against the Pan American Commission Corporation, Comision Reguladora del Mercado de Henequen, Dinkins, Wexler and others alleging conspiracy to monopolize the importation of sisal into the United States. The defendants moved to dismiss the bill on the ground that the questions sought to be raised in the litigation had become moot. On the hearing of the motion, the Government asked permission to offer evidence taken in support of the bill, and leave to do so having been granted, the Government put in all the evidence taken by deposition and rested. The defendants then put in all their testimony and rested. Judge Hough dismissed the bill on the ground that the case had become moot, but in so doing he said at page 233:

"The claim of conspiracy rests on one of two propositions; at least I can discover no other even suggested by the government. Either anyone who lends money to a monopolist becomes a partner or conspirator with him by the act of loan, or the conspiracy depends on some spiritual or sympathetic emotion actuating the loan.

The first proposition is not, I apprehend, relied on, and is bad law anyhow. As to the second, it seems to me no more than a decent regard for citizens accused of wrongdoing to record my opinion that this record contains no evidence whatever of any sympathy with or desire to assist anybody who wished to raise the price of sisal in the United States over November, 1915, price, on the part of Messrs. Wexler and Dinkins.

It is natural to inquire, why and how did the price-raising efforts of the Reguladora succeed? Here, as was done by the Supreme Court, we can and must take judicial notice of the present war, and its more notorious results. Not much judicial notice need be taken, for the evidence shows the movement and use of manilla hemp, which is what really controls the price of sisal. The inferior fiber must find its own level, with reference to manilla prices and supply.

In my opinion the one thing (except Alvarado's iron hand) that has put up the price of sisal is the lack of shipping to move manilla and the enormous demand for manilla for marine rope. This is just as much the result of a war, of *the* war in which *we* are now engaged, as the situations recognized as 'staying the hand of the court', in the cases first above cited.

Motion granted, and bill dismissed without prejudice."

The decision of Judge Hough disposes of everything contained in Article IV of the petition.

Article V of the petition is entitled "Efforts on the part of certain defendants to restrain and monopolize trade and commerce in sisal between 1917 and 1921" (R. 7).

This Article starts out with an allegation that the

Comision Reguladora was obliged to borrow large sums from banks in the United States, and that most of this money was furnished by The Equitable Trust Company of New York and the Royal Bank of Canada, while some of it was also furnished by the Interstate Trust and Banking Company of New Orleans and other banks in the United States.

In view of the statement in the opinion of Judge Hough, quoted above, it is not surprising that the banks felt perfectly safe in making loans to the Comision Reguladora del Mercado de Henequen in the ordinary course of their banking business upon the security of sisal being imported into the United States. Indeed if the banks of the United States had not been willing to finance the importation of sisal from Yucatan, the price of binder twine which would have resulted during the war when the demands for all other fibers were so enormous, would have been disastrous to the farmers of the United States.

In 1919 the banks which had made these advances were suddenly faced with a great drop in the price of sisal. This drop in the price of sisal occurred as part of the sweeping economic readjustment which took place in that year. The banks thereupon refused to make further advances to the Comision Reguladora, and the Yucatan State Government declared a free and open market for sisal in Yucatan.

In August, 1919, the Banks foreclosed on the sisal stored in the United States, and organized the defendant Eric Corporation, which purchased the stock of sisal sold at the foreclosure sale. The allegations of the petition contained in Article V show the continued efforts of the Banks to dispose of the accumulated stock of sisal during the period from August, 1919, to March 19, 1921. Emphasis is laid in the petition upon the purchase by the Eric Corporation of 250,000 bales of sisal from the Comision Reguladora del Mercado de Henequen which is alleged to have taken place by contract of January 23, 1920 (R. 10). It must be remembered, however, that when this purchase

was made the market for sisal in Yucatan was open and the result of this purchase was simply to add to the stock of the Eric Corporation, and in no way to monopolize the sisal market, sisal being constantly produced and purchased in Yucatan by buyers other than the Eric Corporation (R. 8, 10, 11).

This period terminates with the imposition on March 19, 1921, by the Mexican Federal Government of a discriminatory tax on sisal in favor of the Comision Monetaria. From March 19, 1921, to August 23, 1921, the Comision Monetaria was engaged in purchasing sisal in Yucatan under the contract of April 20, 1921 (Exhibit "B" annexed to the petition) by the terms of which the Eric Corporation made advances to the Comision Monetaria to enable it to make such purchases (R. 29). In July, 1921, the Eric Corporation refused to make further advances of money to the Comision Monetaria, and on August 23, 1921, the Federal Government of Mexico repealed the discriminatory export tax on sisal.

It is very important to note that it is alleged in the petition (R. 11) that after August 23, 1921—"Again there existed an open market in Yucatan which continued until the establishment of the present monopoly as hereinafter described."

It is alleged in Article V of the petition that the stock of sisal of the Comision Monetaria was added to the stock of the Eric Corporation. As a matter of fact, as appears elsewhere in the petition, the title to this sisal remained in the Comision Monetaria and the same was simply pledged to the Eric Corporation. This sisal was afterwards disposed of by a sale from the Comision Monetaria to the Comision Exportadora. *All of the sisal of the Eric Corporation, whether acquired from banks which originally held the same as security, or from the Comision Reguladora del Mercado de Henequen, and all of the sisal of the Comision Monetaria, had been disposed of to binder twine manufacturers prior to the filing of the Government's petition* (R. 21).

This brings us to Article VI of the petition, which is entitled "The existing restraint and monopolization" (R. 12).

All of the allegations of the petition which precede Article VI were admittedly inserted in the petition for the sole purpose of showing the alleged dominant purpose of the defendants to monopolize trade in sisal. It is the contention of the defendants, on the contrary, that these allegations clearly show that the defendants came into the sisal business as bankers for the sole purpose of financing the importation of sisal into the United States, and that after they had acquired the large stocks of sisal upon which they were obliged to foreclose when the Comision Reguladora collapsed in 1919, their only desire was to dispose of this collateral at the earliest possible moment to anyone who would purchase the same upon reasonable terms.

The vital allegation of Article VI of the petition is as follows (R. 12):

> "On or about May 1, 1921, the defendants (except the Comision Exportadora de Yucatan and the Sisal Sales Corporation) being alarmed by threatened conditions of competition in the sisal trade, and seeking to secure the control of the business which it had been the purpose of the Eric Corporation and the Comision Monetaria to exercise, which control it had become apparent could not be made completely effective by the combination between the Eric Corporation and the Comision Monetaria combined, conspired, and confederated together to restrain and monopolize the interstate and foreign trade and commerce of the United States in sisal, and to prevent and restrain competition in the purchase and sale of sisal, and to maintain the price of that commodity at much higher levels than would obtain under conditions of free and open competition.
>
> In pursuance of their unlawful purpose, the defendants, Charles D. Orth, Alvin W. Krech, Lynn H. Dinkins, F. W. Black, J. A. Beatson, Frederick T. Walker, Michael J. Smith, Tomas Castellanos Aceve-

do, and others, held a series of conferences in New York City, and elsewhere in the United States, *at which it was agreed that the defendant, Tomas Castellanos Acevedo* (now attorney in fact for the said defendant, Comision Exportadora de Yucatan, formerly Comision Reguladora del Mercado de Henequen) *should proceed to Yucatan, Mexico, and arrange with the persons in control of the Yucatan State Government, and others, for the formation of an organization under the control of the Yucatan State Government, to engage in the purchase, sale, and export of sisal produced in Yucatan, and to cause to be enacted in the Republic of Mexico, or in the States of Yucatan and Campeche, any laws or regulations necessary to create a monopoly of the sisal produced in said states, and such laws and regulations as might be necessary for a reduction of acreage and control of prices.*" (Italics ours.)

It is then alleged that the following events took place:

On July 16, 1921, a law was passed by the State of Yucatan forming a new Comision Reguladora del Mercado de Henequen. The name of this new Comision Reguladora del Mercado de Henequen was changed on January 2, 1922 to Comision Exportadora de Yucatan. On September 12, 1921 a contract was entered into between defendants Hanson and Orth and the Eric Corporation (Exhibit "C" annexed to the petition), whereby Hanson and Orth became the general managers of the business of the Eric Corporation (R. 31). On November 5, 1921 the defendant Sisal Sales Corporation was formed. On December 13, 1921 a production tax was placed upon sisal by the state of Yucatan and on December 14, 1921 a law restricting the production of sisal was passed by the state of Yucatan. On December 22, 1921 the stock of the Eric Corporation was sold to the Comision Exportadora de Yucatan and a contract was entered into between the Comision Exportadora de Yucatan and the Sisal Sales Corporation whereby the Comision Exportadora appointed the Sisal Sales Cor-

poration its exclusive selling agent for the sale of sisal. This contract is annexed to the petition and marked Exhibit "G" (R. 37).

On January 1, 1922, the Mexican Federal Government reduced the surtax on all state taxes from 50% to 25%, thus making the discrimination in favor of the Comision Exportadora about 2¼¢ per pound. On January 2, 1922, the Comision Exportadora was exempted from payment of the production tax of December 13, 1924 (R. 18).

Then follows the allegation of the actual creation of the monopoly complained of (R. 19). It is alleged that "even after the Comision Exportadora de Yucatan began purchasing sisal on January 2, 1922, independent powers continued to purchase, paying the 2¼¢ U. S. gold per pound discriminatory tax". The petition then continues

> "In order to completely insure against the further purchase of sisal in Yucatan by independent buyers, the State Government of Yucatan, *on March 7, 1922, in pursuance of agreements made in the United States between Tomas Castellanos Acevedo and his associates and officials of the Sisal Sales Corporation, and as a result of the efforts on the part of the said Castellanos and his associates, imposed an additional special tax of 4 cents Mexican per kilo, which with the Mexican Federal surtax of 25 per cent would amount to 5 cents Mexican per kilo (or about 1-1/8 cents U. S. gold per pound), all sisal held by or delivered to the Comision Exportadora de Yucatan being exempted from such tax.*"
>
> * * * * * * *
>
> "This made the total discriminatory taxes in favor of the Comision Exportadora de Yucatan, including the Federal surtax of 25 per cent, amount to 15 cents Mexican per kilo (approximately 3⅜ cents U. S. gold per pound). *The immediate result was to put independent buyers out of business, causing them to close their offices and return to the United States, thus perfecting a complete monopoly in Mexican sisal. Shortly thereafter the Comision Exportadora de Yucatan be-*

gan paying the Yucatan producer 3½¢ per pound, instead of 4 cents per pound for sisal. Sisal was then being sold by the Sisal Sales Corporation in the United States at 6¼ cents Gulf (6½ N. Y.) per pound." (Italics ours.)

The remainder of the petition contains a number of allegations as to transactions which took place subsequent to March 7, 1922, the date upon which the monopoly was complete.

Summary of Argument.

It is the position of the appellees in whose behalf this brief is filed, that it is entirely clear from the express allegations of the petition that the alleged monopoly depended for its existence entirely upon the discriminatory tax laws of the State of Yucatan in favor of Comision Exportadora. That this is true is apparent from the history of the various attempts at monopolization of trade in sisal as set forth in the petition and the reasons for the respective successes and failures of these attempts (see summary, page 6 of this brief). The "unlawful agreement" alleged to have been made by a number of the defendants, in pursuance of which it is claimed the monopoly resulted, contemplated that Castellanos should proceed to Yucatan, Mexico and "cause to be enacted in the Republic of Mexico or in the States of Yucatan and Campeche any laws or regulations necessary to create a monopoly of the sisal produced in said States and such laws and regulations as might be necessary for a reduction of acreage and control of prices" (R. 12). Prior to the enactment of the discriminatory tax laws competition existed and immediately upon the enactment thereof competition ceased (R. 19). The fact that the monopoly was wholly dependent for its existence upon the laws of the State of Yucatan is fully recognized in the opinion of the District Court.

It is manifest that the creation of a monopoly by the laws

of a foreign state would not constitute a violation of our anti-trust statutes. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (s. c. 160 Fed. 184, 166 Fed. 261).

It would be utterly futile to grant the injunctions prayed for in the petition, for, if granted, it would not affect the discriminatory tax laws of the State of Yucatan by virtue of which the monopoly is alleged to have been created and become effective; nor would they prevent the Comision Exportadora from continuing to sell sisal in the United States through agencies other than the defendants and with other financial support.

ARGUMENT.

I.

The Power of Injunction is properly used only to restrain present wrongs or prevent threatened ones and unless the Petition shows a present or threatened unlawful monopoly at the time it was filed, it was properly dismissed.

In view of the fact that so much of the Government's petition consists of a narrative of past events and situations, and of contracts and arrangements, which had terminated prior to the filing of the petition, we propose at the outset of this discussion to draw attention to the particular monopoly and the particular contracts which are alleged to exist at the time the petition was filed and which the Government is seeking to restrain.

The monopoly of which the Government is making complaint is "the existing restraint and monopolization" (R. 12) which is alleged to have begun on March 7, 1922, immediately upon, and as the direct consequence of certain discriminatory tax laws passed by the State of Yucatan (R. 19). Of course, the Government does not seek to enjoin the foreign government from continuing to enforce these laws, as this would be so obviously absurd. What the Government does ask is, that the defendants be enjoined from continuing to deal with each other and from continuing to carry out the contract dated January 22, 1921, as amended by the supplemental contract dated June 19, 1923. This contract as amended is between Comision Reguladora and Sisal Sales Corporation and provides that the latter shall act as the sales agent of the former. Consideration of this contract will be reserved for a later subdivision of this brief, but it is here to be emphasized that this is the only contract of importance that was in existence at the time the petition was filed and it is the only contract mentioned in the prayer of the petition the carrying out of which the Government is seeking to restrain (R. 23, 24.)

On pages 17 and 18 of the Government's brief there will be found a statement of various acts which the Government claims are unlawful and were participated in by the defendants and upon which the Government's argument for injunction is based. An analysis of these alleged acts in connection with the corresponding allegations of the petition will show that, aside from the contract of December 22, 1921, as amended June 19, 1923, and the alleged conspiracy to bring about the discriminatory tax legislation in Yucatan, the Government is relying upon (1) a certain contract between Sisal Sales Corporation and a steamship company for the transportation of sisal and (2) certain acts which are alleged to have resulted in the pooling of the stocks of sisal acquired by foreclosure by the banks in the United States subsequent to the year 1919 with certain other stocks of sisal.

So far as the transportation contract is concerned, it is specifically alleged in the petition that this contract was dated May 12, 1923, and did not become effective until June 1, 1923 (R. 20), which was more than a year after March 7, 1922, when the monopoly complained of was alleged to have become "complete" (R. 19). Furthermore it specifically appears from the petition that prior to the filing thereof this transportation contract had been cancelled. In the face of these definite allegations showing that this contract could not have had anything to do either with the creation of the alleged monopoly or with the situation existing at the time the petition was filed, it is difficult to see how the Government can seriously argue that any importance whatever should be attached thereto.

With regard to the alleged unlawful pooling agreements, the allegations of the petition state that the stocks of sisal involved were surplus stocks which had accumulated as the result of the after war readjustment and particularly as the result of the increased supply of manila hemp which was available as soon as the excessive war demand was over (R. 8); that the defendant banks acquired the stocks

of sisal by foreclosure proceedings in order to recover bank loans made in the course of their banking business (R. 8); that the alleged sale of the stocks of sisal from Eric Corporation to Comision Exportadora was made for "a price equal to all outstanding obligations and liabilities of the Eric Corporation secured by such sisal" (R. 17); that the agreement of sale of this sisal was made on December 22, 1921 (R. 17) at a time when an open market for sisal existed in Yucatan; and that for two and one-half months thereafter "independent buyers continued to purchase" sisal in Yucatan and ceased to purchase as the "immediate result of the discriminatory tax laws of that State" (R. 19). Could anything be more clear from the Government's own statement of the facts than that the defendant banks were doing a legitimate banking business of advancing money on sisal; that the purpose of this sale was not an unlawful one to obtain exorbitant prices or indeed any profit whatever but was merely to recover loans; and that the sale did not result in the alleged existing monopoly but that the latter resulted immediately and directly from the law of the State of Yucatan, which was enacted two and one-half months later? And finally, with reference to the alleged pooling agreements, it definitely appears from the petition that the stocks of sisal affected thereby had been disposed of prior to the filing of the petition and consequently they do not form any part of the situation existing at that time (R. 21). This is recognized in sub-paragraph (*b*) on page 18 of the Government's brief by the phrase "(these stocks later disposed of)".

When, therefore, the various acts specified on pages 17 and 18 of the Government's brief are examined and the allegations of the petition in regard thereto are analyzed, the gist of the matter is this: The only monopoly and the only unlawful agreement which the Government claims existed at the time the petition was filed, is the monopoly which followed the discriminatory tax legislation in Yucatan on March 7, 1922, and the contract between Comision

Exportadora and Sisal Sales Corporation of June 22, 1921, as amended on June 19, 1923.

In this connection it is to be borne in mind that the power of injunction is a power which is used only to restrain present wrongs or prevent threatened ones. This rule is strikingly stated in the opinion by Circuit Judge Buffington, in the case of *United States* v. *United States Steel Corporation*, 223 Fed. 55, 59 [The judges sitting in this case were Circuit Judges Buffington, Hunt, McPherson and Woolley], as follows:

> "Now unlawful restraints of trade are of three kinds, past, present, and future. As to present and future restraints, Congress by section 4 empowered 'the Attorney General to institute proceedings in equity to prevent and restrain such violations,' and to that end invested the courts 'with jurisdiction to prevent and restrain violations of this act'. The jurisdiction here conferred is the chancery power of injunction, a power which is used to restrain present wrongs or prevent threatened ones. This is shown by the act providing even for temporary preliminary restraining orders while the case is being heard. 'The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already.' (Citing cases.)"
>
> * * * * * * *

And after considering the Powder Case and the Standard Oil Case, Judge Buffington continued:

> "To this we may add that, while the power to dissolve was for the same reason exercised by us in the Powder Case, yet it will be observed there was in that case a refusal to enjoin as to certain defendants, the court saying:
>
> > 'As the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law, or threatening to violate it, when the suit was commenced.'

> Indeed in each of the cases, the injunction was granted, not to enjoin past violations, or because there had been violations in the past, but because such violations were continuing when the bill was filed. It will therefore appear that by this act a comprehensive plan of relief was mapped out, 'to protect trade and commerce against unlawful restraints and monopolies': First, a criminal prosecution by the government under sections 1 and 2 for all violations, past and present; second, an injunction in equity, on complaint of the Attorney General, under section 4, against all present or threatened violations of the act; and, third, a civil suit under section 7 by anyone injured against any violator of this act."

Applying the rule announced in the foregoing opinion to the present case, we reach the conclusion that unless the monopoly which began on March 7, 1922, following the tax legislation in Yucatan on that date, or the contract of June 22, 1921, as amended June 19, 1923, between Comision Exportadora and Sisal Sales Corporation, constitute a violation of the Anti-trust laws, the petition was properly dismissed.

II.

The contract of December 22, 1921, as amended by the contract of June 19, 1923, is not objectionable either under the Sherman Act or under the Wilson Act.

This contract was entered into between the Comision Exportadora and the Sisal Sales Corporation on December 22, 1921, at a time when an open market for sisal existed in Yucatan, and there is nothing in the terms of the contract which constitutes a violation of either the Sherman Act or the Wilson Tariff Act. The reasons which led the Sisal Sales Corporation to enter into this contract are fully stated in the body of the contract itself (R. 37, 38); and thereupon the contract continues by stating the

correct standard for the fixing of the prices for Yucatan sisal as follows:

> "There is, in our opinion, but one standard for fixing the price and value of Yucatan sisal, and that is the prices which are ruling from time to time in the markets of the world of such other fibers as are of equal or approximately equal intrinsic value. We refer to Java sisal, East African sisal, New Zealand hemp and Manila hemp of, say, current (Government Grade 'I') quality. It is not fair to the binder-twine consumers of the world, nor to the best interests of the sisal-hemp planters of Yucatan, to endeavor at any time to secure for Yucatan sisal a price in excess of such indicated value. Moreover, it would in our opinion be contrary to the spirit, if not the letter, of American law.
>
> If it is clearly understood and agreed that the foregoing facts and conditions constitute the fundamentals upon which the agreement is based, the undersigned Sisal Sales Corporation (hereinafter referred to as the 'corporation') is willing to enter into the following agreement with Comision Reguladora del Mercado de Henequen (hereinafter referred to as the 'comision'), an institution created by act of the Legislature of the State of Yucatan, Mexico, dated July 16, 1921:
>
> The comision will appoint the corporation the general agent of the comision for the purposes hereinafter set forth." (R. 38, 39.)

The provision of the contract for the setting of price limits by the Comision Exportadora is as follows:

> "Sales made by the Corporation shall be for account and risk of the Comision and shall be based upon price limits to be given by the Comision, which agrees that the prices which it may fix from time to time shall not be higher than those asked by other sellers of sisal nor higher than a fair and reasonable parity of price for sisal based upon its intrinsic value as compared with the prices of other fibers." (R. 39.)

It will be seen that there is an express stipulation in the contract guarding against the asking of unfair prices for sisal by the Comision Exportadora, and that the standard for fixing prices agreed to in the contract is well within the standard approved by Judge Hough in *United States v. Pan-American Commission, supra* (page 7). There is no allegation anywhere in the petition that the contract of December 22, 1921, has not been carried out in good faith in accordance with its terms.

The contract of June 19, 1923 (Exhibit "I" annexed to the petition) merely modifies the contract of December 22, 1921, in respect to the compensation of the Sisal Sales Corporation and provides for the loaning of money by the Sisal Sales Corporation to the Comision Exportadora for the purpose of developing the sisal industry in Yucatan.

The intent and effect of the contract of December 22, 1921, was to appoint the Sisal Sales Corporation the exclusive selling agent in the United States of the Comision Reguladora. It is well established that a contract appointing an exclusive selling agent is not objectionable under the Anti-Trust Laws of the United States.

> *Virtue* v. *Creamery Package Mfg. Co.*, 1910, 227 U. S. 8.

In this case, which was an action to recover treble damages under the Sherman Act, Mr. Justice McKenna said at page 37:

> "The Owatonna Company did nothing more in its contract with the Creamery Package Manufacturing Company than to make that Company its exclusive sales agent, and this was no violation of law."

See also—

> *Baran* v. *Goodyear Tire & Rubber Co.*, Dist. Court, Southern Dist. of New York, 1919, 256 Fed. 571;
>
> *Whitwell* v. *Continental Tobacco Co.*, C. C. A., 8th Circuit, 1903, 125 Fed. 454;

American Sea Green Slate Co. v. *O'Halloran*, C. C. A., 2nd Circuit, 1915, 229 Fed. 77;
Locker v. *American Tobacco Co.*, C. C. A., 2nd Circuit, 1914, 218 Fed. 447.

As a matter of fact, Congress has expressly sanctioned the establishment in this country of exclusive sales agencies for the products of foreign producers.

Section 802 of the Act of Sept. 8, 1916, Chapter 463 (Federal Statutes Anno., 1918, Supp. p. 872), provided:

> "That if any article produced in a foreign country is imported into the United States under any agreement, understanding, or condition that the importer thereof or any other person in the United States shall not use, purchase, or deal in, or shall be restricted in his using, purchasing, or dealing in, the articles of any other person, there shall be levied, collected, and paid thereon, in addition to the duty otherwise imposed by law, a special duty equal to double the amount of such duty: *Provided, That the above shall not be interpreted to prevent the establishing in this country on the part of a foreign producer of an exclusive agency for the sale in the United States of the products of said foreign producer or merchant,* nor to prevent such exclusive agent from agreeing not to use, purchase, or deal in the article of any other person, but the proviso shall not be construed to exempt from the provisions of this section any article imported by such exclusive agent if such agent is required by the foreign producer or if it is agreed between such agent and such foreign producer that any agreement, understanding or condition set out in this section shall be imposed by such agent upon the sale or other disposition of such article to any person in the United States (39 Stat. L. 799)." (Italics ours.)

The provisions of the contract of December 22, 1921, and the contract of June 19, 1923, with regard to the advancing of money by the Sisal Sales Corporation to the Comision Exportadora are not objectionable under either

the Sherman or the Wilson Act. In this connection we refer to the following statement of Judge Hough in the Pan-American Commission case, *supra*:

> "The claim of conspiracy rests on one of two propositions; at least I can discover no other even suggested by the Government. Either anyone who lends money to a monopolist becomes a partner or conspirator with him by the act of loan. * * * The first proposition is not, I apprehend, relied on, and it is bad law anyhow."

III.

It is apparent on the face of the petition that the monopoly alleged to have existed at the time of the filing of the petition was caused solely by a governmental act of the State of Yucatan.

A large part of the Government's brief is devoted to the endeavor to draw the attention of the Court away from the discriminatory tax laws of the State of Yucatan as the source of the alleged monopoly and to the contention that the anti-trust laws have been violated by reason of certain alleged contracts and acts done in the United States. Turning, however, from the Government's brief to the petition itself, we find a most extraordinary case presented. When the allegations of the petition are analyzed and reduced to their lowest terms, it appears that what the Government really asserts is that three banking institutions in this country conspired with each other and with a foreign government to bring about the enactment of tax laws by that government which created a monopoly in the foreign country.

At the very outset of Article VI of the petition which contains the first words about "the existing restraint and monopolization" (R. 12), after a paragraph of general allegations, it is alleged that in the course of a series of con-

ferences held in New York City "it was agreed that the defendants, Tomas Castellanos Acevedo . . . should proceed to Yucatan, Mexico, and arrange with the persons in control of the Yucatan State Government, and others, for the formation of an organization under the control of the Yucatan State Government, to engage in the purchase, sale, and export of sisal produced in Yucatan, and *to cause to be enacted in the Republic of Mexico, or in the States of Yucatan and Campeche, any laws or regulations necessary to create* a monopoly of the sisal produced in said states, and such laws and regulations as might be necessary for a reduction of acreage and control of prices." (Italics ours, R. 12.)

Furthermore, it is alleged that a law of Yucatan was enacted on or about July 16, 1921, putting the old Comision Reguladora del Mercado de Henequen into liquidation and establishing a new Comision Reguladora del Mercado de Henequen, and that this law was enacted by the State of Yucatan "largely through the activities of Tomas Castellanos Acevedo and his associates in carrying out his unlawful agreement with the other defendants in the United States, heretofore referred to" (R. 13); that as a result of the same alleged unlawful agreement made by the defendants in the United States at the series of conferences above mentioned the State of Yucatan enacted a law on December 13, 1921, imposing certain taxes on the production of sisal and a further law on December 14, 1921, making certain restrictions upon the production of sisal (R. 15, 16); and that on January 2, 1922, an additional law was enacted by the Government of Yucatan granting exemption to Comision Exportadora from payment of the production tax imposed by the law of December 13, 1921, thus for the first time making a discrimination in the taxes in favor of the Comision Exportadora (R. 18).

Even after the enactment of these laws by the State of Yucatan a monopoly had not been created, for it definitely appears that after January 2, 1922, "independent buyers

continued to purchase" sisal, paying the taxes which had become discriminatory on January 2, 1922 (R. 19). It was not until March 7, 1922, that the monopoly resulted by reason of an additional discriminatory tax alleged as follows:

> "* * * the State Government of Yucatan, on March 7, 1922, in pursuance of agreements made in the United State between Tomas Castellanos Acevedo and his associates and officials of the Sisal Sales Corporation, and as a result of the efforts on the part of the said Castellanos and his associates, imposed an additional special tax of 4 cents Mexican per kilo, which with the Mexican Federal surtax of 25 per cent would amount to 5 cents Mexican per kilo (or about 1 1/8 cents U. S. gold per pound), all sisal held by or delivered to the Comision Exportadora de Yucatan being exempted from such tax." (R. 19.)

The result of the last mentioned legislation is alleged as follows:

> "The immediate result was to put independent buyers out of business, causing them to close their offices and return to the United States, thus perfecting a complete monopoly in Mexican sisal." (R. 19.)

It is, therefore, manifest on the face of the petition that the monopoly alleged to be existing at the time the petition was filed, was caused solely by legislation of the State of Yucatan, and that to remove the laws, proclamations and decrees of the State of Yucatan and the Republic of Mexico from the petition is to remove the very life and breath of the petition itself.

IV.

The act of persuading a foreign government to enact a statute is not within the scope of either the Sherman Act or the Wilson Act.

A case strikingly similar to the present case, as set forth in the petition, is *American Banana Company* v. *United*

Fruit Company, Circuit Court, Southern District of New York, 1908, 160 Fed. 184, affirmed by the Circuit Court of Appeals for the Second Circuit, 1908, 166 Fed. 261, affirmed by the Supreme Court, 213 U. S. 347.

This was an action for treble damages under Section 7 of the Sherman Act. The defendant filed an answer to the complaint but at the start of the trial, after the jury was sworn, it made a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The action was on the law side and the motion was made under the New York practice. The facts of the complaint assumed by Judge Hough, for the purposes of the motion to dismiss them before the Court, to be well pleaded or capable of judicial cognizance were much more favorable to the plaintiff than the allegations in the petition herein and, with the Court's permission, we will summarize them as follows:

(1) In June, 1904, there existed in the United States a combination in restraint of trade or commerce in bananas with foreign nations and the defendant was an active party in and to such combination.

(2) At the same time the defendant was either monopolizing or attempting to monopolize trade or commerce in bananas with foreign nations.

(3) In June, 1904, one, McConnell, was in peaceable possession of a plantation situated within the boundaries of the Republic of Panama.

(4) In that month and year the plaintiff acquired McConnell's rights to his plantation and also a concession from the Republic of Panama to construct a railroad to bring the produce of the plantation to tidewater.

(5) Later, in 1904, the Executive Department of the Government of Costa Rica, acting through officials (either military or civil) and soldiers in its service, forcibly ejected

the plaintiff from the plantation and seized its personal property.

(6) *Such ejection and seizure was perpetrated by the Costa Rican officials and soldiers at the instigation, suggestion and procurement of the defendant, and for the purpose of preventing the plaintiff from harvesting bananas and transporting them to the United States in competition with the defendant's imports.*

(7) The conduct of these officials and soldiers was approved and ratified by the Government of Costa Rica.

(8) Before the transfer of the plantation from McConnell to the plaintiff, an action had been brought in the courts of Costa Rica, seeking to establish title to the plantation in one, Astua, a citizen of Costa Rica, and in such suit a judgment was rendered, after the transfer, declaring the title to be in Astua.

(9) *Such proceedings were taken at the instigation or for the benefit of the defendant with the purpose of preventing the plaintiff from gathering bananas and exporting them to the United States in competition with the defendant, and shortly after the decree Astua's title was transferred to a corporation allied with and controlled by the defendant and identified with the unlawful combination and monopoly.*

(10) The above proceedings of the civil or military officials of Costa Rica and of the soldiers of that Government and of the court thereof, were taken in pursuance of an asserted right of sovereignty over the plantation, which assertion of sovereignty was irreconcilable with delimitation of boundaries between Panama and Costa Rica made by President Loubet in pursuance of an international arbitration agreement.

(11) Despite protests from the Department of State of the United States made to the Government of the Repub-

lic of Panama, Costa Rica maintained *de facto* jurisdiction and sovereignty over the plantation.

(12) By reason of the facts stated above, the plaintiff has never exported, gathered, cut or harvested any bananas and has never engaged in trade or commerce in bananas.

(13) Both Costa Rica and Panama were sovereign, independent nations.

(14) For the purpose of preventing competition in the exportation of bananas from Costa Rica and Panama, the defendant, by outbidding all other competitors, had secured long term contracts with most, if not all, of the purchasers of bananas in that region.

(15) The defendant had also caused to be established a transportation line between ports of the United States and Costa Rica and Panama, which transportation line refused to accept merchandise from the plaintiff or charged the plaintiff higher rates for its service than it charged other persons and corporations similarly situated.

(16) The defendant had sought to cripple and embarrass the plaintiff in its attempted business operations by enticing away its employees and threatening to discharge from its own service such of its workmen as became interested financially in the plaintiff's enterprise.

Judge Hough, under the above assumptions, dismissed the complaint.

Mr. Justice Holmes, in delivering the affirming opinion of the Supreme Court, said at page 357:

> "Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law

begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed."

And at page 250:

"The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. * * * The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."

And at page 359:

"Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the act of Congress and discloses nothing that we can suppose to have been a tort where it was done. *A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.*" (Italics ours.)

V.

This Court will not and cannot investigate, examine and enquire into the laws of the State of Yucatan or the reasons for the enactment of the same.

Judge Hough, in deciding the *American Banana* case in the District Court (160 Fed. 184), said at page 188:

"But neither Costa Rica nor its officers could be brought into our courts, for reasons fully and forcibly set forth by Wallace, *J.*, in Underhill *v.* Hernandez, 65 Fed. 581, 13 C. C. A., 51, 38 L. R. A. 405, affirmed 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

No opinion is here expressed as to whether the cause of action be local or not, or whether within the reasonable interpretation of section 7 of the act of seizure was 'anything forbidden or declared to be unlawful' by the Sherman Act. The case last cited renders the plaintiff's claim untenable by civil action in any American court, and on grounds of the highest public policy. It is impossible to adjudicate this matter without sitting in judgment on the right of Costa Rica to do what was done. The defendant's malice, intention, or expected profit is no more important than are similar considerations in an action for false arrest—before the illegality of the arrest be demonstrated. There, as here, it is of the essence of the court's jurisdictional power to determine the validity and legality of the governmental action out of which the suit grows, and this court has no power to sit in judgment on the validity or legality of the act of any sovereign independent nation."

In the Circuit Court of Appeals (166 Fed. 261) the opinion was as follows:

"Now the only theory upon which the plaintiff can be awarded damages against the defendant is that it is responsible for unlawful acts instigated by it. It cannot be held responsible for procuring that to be done by authority of the government of Costa Rica which was lawful. Consequently this court is called upon to investigate the lawfulness of acts done under the authority of a foreign independent state. But this court cannot undertake any such investigation. The acts complained of were adopted by the government of a sovereign state in its political capacity and in the exercise of its *de facto* sovereignty. The question of their legality or illegality cannot be determined by the courts of another country."

* * * * * * *

"Upon principle and authority, it follows that Costa Rica is entitled to immunity from any investigation of its sovereign acts by this court. The plaintiff, however, asserts that this immunity is only an immunity from suit which has no bearing upon the defendant's liability. But, as we have seen, the immunity is far broader than this. The validity of an act adopted by a sovereign state cannot be inquired into at all—directly or collaterally—by the courts of another state. Relief must be sought in the courts of the former state or through diplomatic channels.

It is further urged that the Costa Rican government should be treated as the agent of the defendant, and that the defendant should be held responsible as principal for its acts. But the relation of a government acting in its political capacity to a person who furnishes the information upon which it acts cannot, from the very nature of things, be that of principal and agent. The early case of Rafael *v.* Verelst, 2 Wm. Black, 1055, cited by the plaintiff, does not sustain any such proposition. The very point of that case was that the Nabob who seized the plaintiff was not acting as sovereign, but contrary to his own inclination—as 'a mere machine, an instrument and engine of the defendant.' In the present case, although instigated by the defendant, there is nothing to show that the Costa Rican government failed to act upon its own responsibility as a sovereign state, or that it ever professed to act in behalf of the defendant.

Upon similar principles, there is no ground for contending that the defendant and the government of Costa Rica were joint tort-feasors. That relation, too, is wholly inconsistent with the relation of a sovereign government acting in its political capacity—as the government of Costa Rica did—to an informer, no matter how malicious the latter might be."

In the Supreme Court of the United States, Justice Holmes said, referring to the point we are now considering:

"For again, not only were the acts of the defendant

> in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. Underhill *v.* Hernandez, 168 U. S. 250."

There is abundant additional authority supporting the proposition set forth at the beginning of this subdivision V of this brief. To quote at length and to comment upon the numerous cases would extend the brief beyond proper limits and it is, therefore, deemed only necessary to refer to the following citations:

Underhill v. *Hernandez,* C. C. A., 2nd Circuit, 1895, 65 Fed. 577.

Oetjen v. *Central Leather Company,* 1918, 246 U. S. 297.

Ricaud v. *American Metal Company, Ltd.,* 1918, 246 U. S. 304.

Hewitt v. *Speyer,* C. C. A., 2nd Circuit, 1918, 250 Fed. 367.

Earn Line Steamship Company v. *Sutherland Steamship Company,* Dist. Court, Southern Dist., New York, 1918, 254 Fed. 126.

The Adriatic, C. C. A., 3rd Circuit, 1919, 258 Fed. 902.

The Florence H., Dist. Court, Southern District of New York, 1918, 248 Fed. 1012.

Wulfsohn v. *Russian Socialist Federated Soviet Republic,* 1923, 234 N. Y. 372.

VI.

The American Banana Case cannot be distinguished from the present case.

The Government has attempted in subdivision III, page 22 of its brief, to distinguish the *American Banana Case, supra*, on several grounds.

In the first place, it is said that the *Banana* case was an action sounding in tort for damages, whereas the *Sisal* case was an action for equitable relief, and that in the former case the damages resulted entirely from the act of the foreign government, whereas in the latter case there are alleged restrictive and monopolistic acts in the United States as well as abroad. The "restrictive and monopolistic acts in the United States" are evidently those referred to on pages 17 and 18 of the Government's brief which have already been dealt with under Subdivisions I, II and III of this argument. So far as the point that the action in the *Banana* case was one in tort for damages, brought under § 7 of the Sherman Act, whereas the action in this case was for an injunction, brought under § 4 of the Sherman Act, it is only necessary to point out that § 7 provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States * * *"

and § 4 provides:

> "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Under the terms of the statute the plaintiff in the *American Banana* case had exactly the same light of action for treble damages as the Government has for an injunction in the present case.

The second ground of distinction urged by the Government is as follows:

> "2. The conspiracy in the *Banana* case was aimed at production only and no intent to affect, or direct effect upon, interstate commerce was shown, while in the *Sisal* case the conspiracy was aimed at restraint upon purchase, transportation, storage and sale—every essential element of commercial traffic and intercourse."

We confess that we see no point whatever in this ground of distinction. It illustrates the lengths which the Government would have this Court go, and the hair-splitting distinctions which would be required to find a difference between the *Sisal* case and the *Banana* case. If there were any point whatever in this contention of the Government, we may refer to sub-paragraphs 6 and 12, pages 29 and 30 of this brief, which are taken almost verbatim from the opinion of District Judge Hough, and from which it appears that in the *Banana* case the acts complained of were done and procured by the defendant "for the purpose of preventing the plaintiff from harvesting bananas and transporting them to the United States in competition with the defendant's imports" and that as a result of said acts "the plaintiff has never exported, gathered, cut or harvested any bananas and has never engaged in trade or commerce in bananas." It thus appears that the *Banana* case was decided upon the express assumption that commerce in bananas with the United States was restrained by the acts complained of.

The last ground of distinction urged in the Government's brief is that the conspiracy in the *Banana* case was entered into in Costa Rica, whereas in the *Sisal* case the alleged conspiracy was entered into in New York. It is

submitted that the whole opinion in the *Banana* case bears out the contention that, where the act complained of is participated in and depends for its results upon an act of a foreign government, an alleged conspiracy to bring about that act would not be contrary to our laws wherever it might have taken place. That it was assumed in the *Banana* case that the alleged conspiracy did take place in the United States may be seen from sub-paragraph 1, page 28 of this brief, and from the following quotation from the opinion of Mr. Justice Holmes:

> "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law."

The Government's brief then proceeds to cite various cases in which the *Banana* case has been distinguished by this court. However, these cases are clearly distinguishable from the *Banana* case and from the present case, because in none of the cases cited did the question of the effect of foreign governmental action arise.

In Subdivision IV, page 29, of the Government's brief, it is further attempted to distinguish the *Banana* case on the ground that the Wilson Act was not referred to in that case, and the contention is made that the construction of the Wilson Tariff Act is still an open question. In this connection the brief refers to an opinion by Attorney General Wickersham, 31 Opinions of the Attorney General, 545, and it is stated that the Attorney General "held that, although *a combination of German potash growers protected by German law* does not in itself violate the Act, its corporate representative in this country is acting unlawfully." In striking contrast to this statement in the Government's brief, we draw attention to the following language from the opinion of the Attorney General, pages 553, 554:

> "Under the Act," (that is the German Act previously mentioned in the opinion) "while no one could sell in a foreign market potash at a price below that

fixed by the board of apportionment, yet free competition was allowed beyond that price, while such competition is entirely destroyed in the agreement in question. This fact alone, without going into the details of the agreement, is sufficient to show beyond question that *the combination is not protected by the German Act* and is such as the Act of Congress condemns, and the only question is whether or not the combination or agreement is made by or between persons or corporations, either of whom is engaged in importing potash into the United States." (Italics ours.)

The above quoted language shows clearly that the Attorney General's opinion is based on the assumption that the German combination is not protected by, or a creation of, the German statute under consideration, and the clear inference of the language is that, if it were so protected, the opinion of the Attorney General would be otherwise.

VII.

If the defendant should be enjoined from further carrying out the contract of December 22, 1921, a monopoly would still continue to exist, and there would be nothing to prevent the Comision Exportadora from doing business through some other agency with the financial support of other banks either in the United States or foreign countries. A court of equity will not grant an injunction which will be futile to bring about the relief sought, and will only work hardship upon the parties affected thereby.

The concluding paragraph of subdivision III, page 29, of the Government's brief, is as follows:

> "The conspiracy had three principal elements, i. e., American financial support, a monopolistic buying agency in Mexico, and a monopolistic selling agency in America. Discriminatory legislation barred all but the Exportadora from the Mexican market, but even

it, with that aid, could not have been an efficient monopolizer there without the American money advanced by the Sisal Sales Corporation, the American monopolistic distributor."

This paragraph states the entire substance of the Government's position. The first element mentioned, "American financial support", is in no way unlawful as is shown by the opinion of Judge Hough in the *Pan-American* Case, *Supra* (p. 9 of this brief). As to the second element mentioned, "a monopolistic buying agency in Mexico", this can only refer to Comision Exportadora which enjoys the monopoly by virtue of the discriminatory tax law of Yucatan of March 7, 1922 and we understand that the Government does not question that the existence of this monopolistic buying agency is subject to the decree of our courts. The third element, "a monopolistic selling agency in America", is Sisal Sales Corporation whose operations are conducted under the contract of December 22, 1921 as amended, which contract has already been dealt with and shown to be lawful under subdivision II of this argument.

In the second sentence of the paragraph quoted, it is recognized that the discriminatory legislation of Yucatan is at the foundation of the monopoly and the inference is that this legislation is not subject to review by our courts, but the contention is that the monopoly was made efficient by money advanced by Sisal Sales Corporation and that that Corporation should be enjoined from making further advances.

Now it is perfectly obvious that, even if the injunction prayed for by the Government were granted in the present case, there would be nothing to prevent the Mexican monopoly from going to Canada, England, or even to financial institutions in the United States other than the defendants, for financial support. The Government does not contend that it is unlawful for the defendants to make loans to the Comision Exportadora except for the reason that they are alleged to have "conspired", and it must fol-

low that any bank in the United States other than the defendants could lawfully give the required financial support to make the Comision Exportadora "an efficient monopolizer".

Obviously the Government would not contend that the Comision Exportadora should be enjoined from doing business in the United States simply because of the fact that it enjoys a monopoly created by statute in Yucatan. The Government admits that this court cannot by injunction effect the very thing which creates the present monopoly, and for this court to issue an injunction against the defendants would simply result in the Comision Exportadora continuing to do business through other agencies and with new financial support.

Such a result would be patently unfair to the defendant banks and upon general principles of equity it is submitted that this court should not issue an injunction which will be ineffective to bring about the desired relief and which will simply prevent the defendants from continuing to carry on a lawful and proper portion of their business.

The opinion of the District Court is correct and the decree appealed from should be affirmed.

Respectfully submitted,

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No. 200

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

THE UNITED STATES OF AMERICA, APPELLANT

v.

SISAL SALES CORPORATION, ET AL.

Appeal from the District Court of the United States for the Southern District of New York

BRIEF FOR HANSON & ORTH, CHARLES D. ORTH, MICHAEL J. SMITH AND CHARLES D. ORTH, JR.

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

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ARGUMENT

SUMMARY

I. A conspiracy to effect a monopoly by means of enactments, proclamations and decrees of a sovereign foreign government is not within the scope of the Anti-trust Laws of the United States. The decision in American Banana Co. *v.* United Fruit Co., 213 U. S. 347, is conclusive on this point 25

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 200

THE UNITED STATES OF AMERICA, APPELLANT,

v.

SISAL SALES CORPORATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR HANSON & ORTH, CHARLES D. ORTH, MICHAEL J. SMITH AND CHARLES D. ORTH, JR.

Previous Opinion in the Present Case.

The opinion of Augustus N. Hand, District Judge, in the Court below, the United States District Court for the Southern District of New York, appears at page 52 of the Record.

Grounds of Jurisdiction.

The order in the United States District Court for the Southern District of New York to be reviewed herein

was filed June 30, 1925 (R. 55). By a petition filed July 24, 1925, the Government prayed for an appeal to this Court (R. 57), and by an order of the Court below filed July 24, 1925, such appeal was allowed (R. 58). Such appeal was allowed pursuant to the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended June 25, 1910, c. 428, 36 Stat. 854, known as the Expediting Act, left in force by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

Statement of the Case.

(a) Preliminary Statement—Sole Question Presented.

This case comes to this Court under the following circumstances:

The Government filed a petition in the District Court for the Southern District of New York (R. 1) praying (R. 23) in substance for an injunction to restrain an alleged monopoly in *sisal* created by a series of enactments, proclamations and decrees of *sovereign foreign governments*, namely, the Republic of Mexico and its constituent State of Yucatan.

The defendants thereupon made a motion in the Court below to dismiss such petition on the grounds set forth in the petition (R. 51, 52), raising in substance the sole question as to the effect of a foreign government monopoly which is hereinafter further considered.

This was the question considered by the Court below and was the question upon which its decision was based (R. 53). The opinion of the Court on this point was as follows (R. 53):

> "The question is whether the defendants now should be restrained from dealing with the Sisal Sales Corporation and its principal Comision Ex-

portadora de Yucatan, because the latter is a monopoly created by the Government of Yucatan and protected by such favorable and discriminatory tax laws of the State that it is enabled to control the American market and fix prices in sisal. I think it manifest from the decision of the Supreme Court in American Banana Co. *v.* United Fruit Company, 213 U. S. 347, that *an agreement to procure monopolistic legislation in another country cannot be treated as unlawful by our courts.* The Government attempts to draw a distinction between the American Banana case because that was an action by an individual to recover treble damages for injuries arising out of a conspiracy to monopolize the banana trade. One of th wrongful acts consisted of a seizure by the Costa Rica Government of a banana plantation belonging to the American Banana Company, at the alleged instigation of the defendant United Fruit Company. The Supreme Court held the cause of action invalid and said 'a conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.'

"If acts 'permitted by the local law' could not be inquired into for the purpose of awarding damages to a person injured, I do not follow the reasoning which regards them as a basis for a suit by the Government to restrain the parties connected with them as conspirators. It is true enough that an act, in itself innocent, may be a step in carrying out an unlawful conspiracy, but *when, as here, nothing remains of the conspiracy that is not dependent upon the claimed unlawfulness of such act the whole case must fall.*

"An injunction to restrain dealings with the Comision Exportadora de Yucatan and the Sisal Sales Corporation would be quite *futile*, so far as the public interest is concerned. Anyone else could

> surely deal with them and the successors to the alleged unlawful conspirators would have to be at once treated as legitimate traders and go scatheless." (Italics ours.)

In view of the circumstance that the brief of the Government argues at great length a long succession of questions of law which seem to have no pertinency to the single point raised by the motion to dismiss or the present appeal, and particularly in view of the fact that as to by far the greater part of the argument contained in the Government's brief there is no dispute between the parties, we shall at first attempt to briefly differentiate between the single question which we conceive to be in dispute between the parties and the many other propositions of law argued in the Government's brief and the soundness of which we do not for a moment question. While the motion below was based upon the grounds of general insufficiency and lack of equity and gravamen of the motion was the third specification, which is as follows (R. 52):

> "It appears on the face of the petition herein that it is impossible to adjudicate or make any judgment or decree in this action, except a judgment or decree dismissing the petition herein, without examining, inquiring into and investigating the laws, proclamations, and decrees of independent and sovereign foreign States, to wit, the Republic of the United States of Mexico and the State of Yucatan, and without investigating, examining, inquiring into, passing upon and judging the lawfulness, validity or legality of said laws, proclamations, and decrees, and of acts done by or under the authority of such sovereign and independent States and the laws, proclamations, and decrees thereof."

It is our contention that the peition conclusively shows that *the only alleged monopoly or restraint of trade therein set forth arises exclusively out of the laws, proclamations and decrees of the Republic of the United States of Mexico and the State of Yucatan;* that the only alleged conspiracy to monopolize or restrain trade is the alleged conspiracy to cause the Republic of the United States of Mexico and the State of Yucatan to enact and promulgate laws, proclamations and decrees which shall effectuate such monopoly and restraint of trade; and that the only effects and results of said monopoly and restraint of trade alleged to have taken place in the United States or elsewhere are effects and results exclusively attributable to the operation of the said laws, proclamations and decrees of the Republic of Mexico and the State of Yucatan. This is the theory upon which the motion was made and is the only point urged upon this Court.

If it be true, as we contend, that repeated adjudications by the United States Courts have established the salutary rule that American Courts will not inquire into the legality or validity of the enactments, proclamations and decrees of sovereign foreign States and Governments for the reason that principles of comity and international good faith lead to a very natural presumption that the enactments, proclamations and decrees of sovereign foreign Governments are entered into in good faith and for proper and lawful purposes; and if it be true that no decision favorable to the plaintiff in the present injunction suit can be rendered upon the state of facts alleged in the petition without inquiring into the legality and validity of certain specific enactments, proclamations and decrees of the Republic of Mexico and the State of Yucatan which are set forth in detail in the said petition and without examining into the good faith with which said

enactments, proclamations and decrees were made and the purposes for which they were promulgated; if these things be true, then the petition of necessity had to be dismissed and such dismissal must be affirmed by this Court. It is to establish these simple premises that the present brief is submitted.

(b) Analysis of Government's Brief.

As the issue is thus narrowed down to a very simple one, we wish to eliminate from the case at the outset the many elementary principles of law argued at such length in the Government's brief but which have no bearing whatsoever upon the contention which we do in fact now advance and about which there is no substantial difference of opinion between the moving defendants and the Government.

Thus, we do not question the soundness of the proposition of law in Point I, page 17, of the Government's brief that a conspiracy to monopolize importation carried into effect by overt acts committed in the United States and abroad is unlawful; but such proposition has no application to the question raised by the motion to dismiss which involves not an ordinary monopoly created by private individuals but a monopoly created by a foreign government. While one would suppose from the brief argument of this point, which consists merely of assertion rather than any logical reasoning, that this point is not seriously advanced, nevertheless the Government's brief returns to this proposition in its Point IV, page 29, in discussing the Wilson Act. However, the simple answer to this point is exactly the same as the answer with respect to the Sherman Act, namely, that that statute does not and does not even purport to apply to a monopoly such as the one

described in the petition created by a sovereign foreign government. Furthermore, the obvious has already been affirmed by a Court of great authority in *Fosburgh* v. *California & Hawaiian Sugar Refining Co.* (1923, C. C. A. 9), 291 Fed. 29, where it held, at page 32:

> "The Wilson Act, as amended (U. S. Comp. Stat. §8831) is not more comprehensive in its scope than the Sherman Act, and serves only to make the law more specific in its application, as it relates to foreign commerce."

Finally, it may be noted that the House Committee on Interstate and Foreign Commerce, which conducted a very extensive series of Hearings on the matter of foreign government monopolies last year and rendered a very complete Report on the subject, referred to more fully hereafter, in discussing all of the possible remedies for the situation involved did not even suggest the possibility that such foreign government monopolies could be attacked under any of the anti-trust laws and came to the conclusion that it would not suggest any remedial legislation at the present time. Here then is direct evidence from the legislature itself that the anti-trust laws are not conceived to be intended to apply to foreign government monopolies. The words of the House Report are as follows (p. 15):

> *"The committee, for reasons heretofore appearing, has not at this time suggested remedial legislation since it believes that a frank discussion of these questions and the development of a better understanding of the consequences of the intrusion of governmental price controls in international trade may secure an abandonment of the practices.* If, however, it develops that the American public cannot be protected against a repetition of its experiences in the past by resort to methods mentioned

> above, the committee will have no hesitation in reopening the question. Accordingly, the committee makes this preliminary report with the purpose of making further report to the House later if the occasion should require it." (Italics ours.)

Point II, page 18, of the Government's brief is entirely misleading in attempting to give the impression that the lower Court in this case held that an unlawful conspiracy is rendered immune from suit on the ground that a particular one of the overt acts on which its success depends was lawful in itself. Of course, the general proposition referred to in such point was not disputed by the lower Court and is not in dispute here. That proposition was expressly considered by the lower Court, and its inapplicability to the case of a *foreign government* monopoly involved here was amply demonstrated in the opinion of the lower Court when it said (R. 54):

> "It is true enough that an act, in itself innocent, may be a step in carrying out an unlawful conspiracy, but *when, as here, nothing remains of the conspiracy that is not dependent upon the claimed unlawfulness of such act the whole case must fall.*" (Italics ours.)

In other words, in this case the sovereign acts of the foreign government creating the monopoly were the heart and soul of the monopoly described in the petition and not just one of many other equally vital elements; and without the actions of the foreign government nothing remained of the monopoly or any alleged conspiracy in this case.

Our point is not that Congress has no power to restrain or prohibit conspiracies to monopolize and restrain the commerce of the United States, both domestic and foreign; nor do we contend that the Sherman Act and the Wilson Act are so narrow in their scope as not to affect the com-

binations entered into either in foreign countries or with the citizens of foreign countries. What we do contend, however, is that *when a monopoly or restraint of trade is alleged to be the direct result of a series of enactments, proclamations and decrees of sovereign foreign Governments, that our Courts for reasons which have been explicitly and repeatedly stated by this Court, will not inquire into the validity or legality of such laws; that neither the Sherman Act nor the Wilson Act were intended to in any way affect monopolies and restraints of trade thus created by enactments, proclamations and decrees of foreign sovereign Governments; and that such enactments, proclamations and decrees, being conclusively presumed to be lawful and proper, there can be nothing unlawful in a 'conspiracy' or agreement to cause such sovereign foreign Governments to pass and promulgate these enactments, proclamations and decrees.*

We have discussed this question of the issue now before the Court at some length in the preliminary portion of this brief because we believe that the brief of the Government, while admirable in the sense that it sets forth with great precision and acumen the general body of law developed by the Courts in construing the commerce clause of the United States Constitution and in construing and applying the long since familiar decisions under the Sherman Anti-Trust Law and the Wilson Act, contains practically no argument at all on the one vital question presented by the motion to dismiss. The only semblance of an argument is contained in Point III, page 22, where there is a superficial attempt to distinguish the *American Banana Co. case* upon which the decision in the lower Court was based and where the fundamental considerations involved in the *American Banana Co.* case are entirely ignored. The alleged limitations of the doctrine of

the banana case are shown merely by an academic review of the later cases of this Court which not only in no way limit the applicability of the *American Banana Co.* case to the facts of this case involving a foreign government monopoly, but in some of such decisions clearly affirm the doctrine of the *American Banana Co.* case as may be observed by a mere inspection of the reference to the cases such as *Ricaud* v. *American Metal Company*, 246 U. S. 304, 309.

The circumstance of the absence of any substantial argument on the point concerning the fact of the foreign government monopoly is all the more striking when one compares the petition, scarcely a page of which does not contain some reference to an enactment, promulgation or decree of the Republic of Mexico or the State of Yucatan, with the voluminous brief submitted by the Government which only refers to these enactments, promulgations and decrees in the most casual and incidental fashion. This striking discrepancy between the *facts* alleged in the petition and the *law* argued in the brief is by no means inadvertent. The sufficiency of the petition, however, must be determined by the facts alleged therein, and these facts, as we maintain, conclusively demonstrate that the only conspiracy alleged was a conspiracy to bring about a monopoly in a particular manner, namely, by inducing the sovereign Governments of the Republic of Mexico and the State of Yucatan to pass certain laws, proclamations and decrees containing discriminatory taxes, limiting production and in other ways creating and maintaining the monopoly. The only monopoly or restraint of trade alleged to exist is a monopoly and restraint of trade flowing immediately and exclusively from these enactments, promulgations and decrees of the Republic of Mexico and the State of Yucatan. No amount of circumlocution or

generalization, no amount of characterization about monopolies, conspiracies, and restraints of trade, can alter the fact that the petition itself discloses a conspiracy addressed entirely to the sovereign Governments of Mexico and Yucatan and to a monopoly effected exclusively by means of perfectly valid and lawful enactments, promulgations and decrees in these two sovereign foreign Governments.

(c) Prior Foreign Government Monopolies from 1915 to 1921 as Alleged in the Petition.

While the defendants, Hanson & Orth, and the respective partners of this well-known firm of sisal brokers who have been engaged in the business of dealing in sisal for a great many years, are not alleged to have had anything to do with the present situation until May, 1921, the first twenty-two pages of the petition (R., 1-11) are devoted to a statement of certain prior monopolies in Mexican sisal which are quite important in connection with the motion and the present appeal, as it appears on the face of the very petition itself that all of these prior monopolies and alleged restraints of trade arose out of a series of laws passed by the *Republic of Mexico or the Yucatan State Government.*

Thus, under the title "First successful monopolization of trade and commerce of sisal in the United States," the petition sets forth an arrangement made between the Pan-American Commission Corporation, organized by Sol Wexler and Lynn H. Dinkins, with the old Comision Reguladora del Mercado de Henequen, which was reorganized prior to November 13th, 1915, by a decree promulgated by the military Governor of Yucatan (R., 5, Petition, p. 10). The terms of this decree are fully set forth, and the effect thereof was to establish what is said to be the first

monopoly of Mexican sisal. This arrangement between the Pan-American Commission Corporation and the Comision Reguladora, pursuant to a decree of the military Governor of Yucatan, is alleged to have resulted in a great increase in the price of Mexican sisal during the war, and this condition apparently existed up until some time in August, 1919 (R., 7, Petition, p. 14). An action brought under the anti-trust laws of the United States for injunctive relief was dismissed by Judge Hough for lack of actuality and without prejudice in *U. S.* v. *Pan-American Commission Corporation,* 261 Fed. 229.

The petition then proceeds to allege that in the latter part of 1919 the price of sisal declined, due to the fact that manufacturers were substituting other fibers and due to general post-war conditions, and that as a result a large surplus of sisal and other fiber had accumulated. As the defendant banks herein had made large advances on a quantity of this accumulated sisal, it is alleged that in the latter part of 1919 (R., 8, Petition, p. 16):

> "The interested banks, realizing that a period of readjustment was at hand, refused further advances. Thus, there being no further outlet for Mexican sisal under the old arrangement, the *Yucatan State Government declared a free and open market.*" (Italics ours.)

The petition then proceeds to set forth the organization of the defendant Eric Corporation by the defendant banks as a selling agency of the large accumulation of sisal, which then amounted to about 400,000 bales. There was in addition, according to the petition, a large surplus of sisal in Yucatan owned by the Comision Reguladora and amounting to approximately 250,000 bales. This surplus stock of the Comision Reguladora was purchased by the

Eric Corporation, the contract of purchase and sale being dated January 23rd, 1920.

It is to be noted that during the period from the latter part of 1919 up to January 23rd, 1920, the free and open market which had been declared by the Yucatan State Government remained in full force and effect.

The petition then sets forth the formation of the Comision Monetaria and pages 19-21 of the petition (R., 10-11) state the negotiations with the Mexican Government with respect to sisal, the plan "to prevail upon the Mexican Government to impose a Federal tax, and thus insure an artificial elevation of the price of sisal," and the bringing about of another and second monopoly in the following specific manner (R., 10-11, Petition, pp. 20-1):

> "The Eric Corporation agreed to advance the Comision Monetaria such sums of money as were necessary to purchase sisal, holding such sisal as collateral security. The contract also contemplated that the Mexican Government would so arrange all Federal export taxes that the Comision Monetaria and the Eric Corporation would be exempt. The Comision Monetaria proposed to purchase sisal at a fixed price of 5½ cents per pound, although the Eric Corporation suggested a price of 6 cents per pound.
>
> "On or about April 23, 1921, the Comision Monetaria began to purchase sisal at 5½ cents per pound, which represented an increase of 1½ cents per pound over the price which had prevailed for several months previous.
>
> "The Mexican Government had, on March 19, 1921, proclaimed a decree increasing the export tax from 2 cents Mexican (1 cent U. S. gold) to 6 cents Mexican (3 cents U. S. gold) per kilo (*i. e.*, 2.2 pounds). The sisal purchased by the Comision Monetaria was shipped in the name and for the ac-

> count of the Eric Corporation. Upon the entry of the Comision Monetaria into the sisal market in Yucatan, *all independent purchasers suspended operations because of the closed market thus brought about by the imposition of the said Federal tax on them*, which tax was discriminatory in favor of the Comision Monetaria and the Eric Corporation." (Italics ours.)

Thus we see that the second alleged monopoly was entirely due to the action of the Mexican Government in the proclamation of a decree increasing the export tax on Mexican sisal and discriminating in favor of the Comision Monetaria. This was the result of (R., 10, Petition, p. 19)

> "Negotiations (which) were carried on between the said Glenn (financial agent of The Equitable Trust Company) and the finance minister of the Mexican Government, de la Huerta."

It is alleged at pages 21 and 22 of the petition (R., 11-12) that the Comision Monetaria collapsed in July, 1921, and that (R., 11, Petition, p. 22):

> "On August 23, 1921, *the said additional Federal export tax of 4 cents Mexican (2 cents U. S. gold) per kilo was repealed*, over the protest of the Eric Corporation. *Again there existed an open market in Yucatan, which continued until the establishment of the present monopoly as hereinafter described.*" (Italics ours.)

Here ends the preliminary portion of the complaint, which plainly shows that in the period from 1915 to August 23rd, 1921, conditions of free trade or of monopoly in Mexican sisal were regulated exclusively by enactments and proclamations of either the sovereign State of Yucatan or the sovereign Republic of Mexico.

The history of the sisal monopoly, just referred to, shows without a doubt that the monopoly of sisal was in each case due to the acts of foreign governments and **that the monopoly has operated successfully without the help or intervention of anybody in the United States and without any of the acts complained of in the petition. Such history is therefore significant in showing that the sisal monopoly being caused by the actions of foreign** sovereign governments, exists irrespective of the acts of any of the defendants alone in the present case. In fact, as will appear hereafter, if anything the acts which were attacked by the petition were designed to assist trade in sisal under the conditions which existed owing to the actions of the foreign governments creating the monopoly with respect thereto.

(d) Present Foreign Government Monopoly.

The present conspiracy to monopolize and restrain trade also relates to and was carried out exclusively by means of enactments, proclamations and decrees of either the Republic of Mexico or the State of Yucatan.

The gravamen of the complaint appears on page 23 of the petition (R., 12). It is alleged that all of the defendants named in the petition conspired and combined together to effect a particular and specific purpose. This purpose is as follows (R., 12, Petition, p. 23):

> "In pursuance of their unlawful purpose, the defendants, Charles D. Orth, Alvin W. Krech, Lynn H. Dinkins, F. W. Black, J. A. Beatson, Frederick T. Walker, Michael J. Smith, Tomas Castellanos Acevedo, and others, held a series of conferences in New York City, and elsewhere in the United States, of which it was agreed that the defendant,

> Tomas Castellanos Acevedo (now attorney in fact for the said defendant, Comision Exportadora de Yucatan, formerly Comision Reguladora del Mercado de Henequen) should proceed to Yucatan, Mexico, *and arrange with the persons in control of the Yucatan State Government, and others, for the formation of an organization under the control of the Yucatan State Government, to engage in the purchase, sale, and export of sisal produced in Yucatan, and to cause to be enacted in the Republic of Mexico, or in the States of Yucatan and Campeche, any laws or regulations necessary to create a monopoly of the sisal produced in said states, and such laws and regulations as might be necessary for a reduction of acreage and control of prices.*" (Italics ours.)

The manner in which this alleged conspiracy was carried out is also specifically alleged and it consists in the inducing of the State of Yucatan and the Republic of Mexico to pass a series of laws which are set forth in the petition with the utmost particularity. The first step was to liquidate the old Comision Reguladora. This was done by a law of the State of Yucatan enacted on July 16th, 1921 (R., 13, Petition, p. 25). This law also provided a moratorium of ten years as to the old Comision Reguladora.

It is then alleged that during this period, when there was, of course, still a free and open market for Mexican sisal, the Eric Corporation entered into a formal contract with the firm of Hanson & Orth, dated September 12th, 1921, by which that firm became the general managers of the business of the Eric Corporation in disposing of its sisal for an annual salary and a commission of 1 per cent. The supplemental contract with Hanson & Orth of June 19th, 1923, and the later contract between Hanson & Orth

and the Sisal Sales Corporation, dated April 1st, 1924, merely supplement and continue the original arrangement. Hanson & Orth were to perform the usual services of fiber brokers in the sale of the sisal at prices subject to the approval and under the exclusive control of the company and they were to follow a general policy fixed and approved by the directors of the corporation.

The Sisal Sales Corporation, which was the new company organized as a selling agency for the banks, was formed on November 5th, 1921, and a contract was entered into between the Sisal Sales Corporation and the new Comision Reguladora on December 22nd, 1921 (Exhibit G, R., 37-40, Petition, pp. 70-5).

The terms of this agreement show a sincere effort on the part of all the American citizens in any way involved in this matter to make an arrangement which should guarantee fair dealing to the American consumers. It was obvious, as had already been held by Judge HOUGH in the *Pan-American Commission Corporation* case, that the price levels of Mexican sisal had a normal and natural relation to the prices of other fibers and particularly manila hemp which was and is so largely used in connection with the manufacture of rope. Accordingly the contract between the Sisal Corporation and the new Comision Reguladora provided (R., 38, Petition, p. 71):

> "On the other hand, in cooperating in any measures that have that object in view, due specifications must be made for the avoidance of the succession of errors which have led to the present condition. The chief of these has been the endeavor of the old Comision Reguladora, as it existed from 1915 and up until recently, to exact undue prices for Yucatan sisal. *There is, in our opinion, but one standard for fixing the price and value of Yucatan sisal, and that is the prices which are ruling from*

> *time to time in the markets of the world of such other fibers as are of equal or approximately equal intrinsic value. We refer to Java sisal, East African sisal, New Zealand hemp and Manila hemp of, say, current (Government Grade "I") quality.*" (Italics ours.)

This effort was made in sincere good faith by the great banking institutions which are defendants in this case and the responsible American citizens of high standing who have cooperated with the banks in this matter. Moreover, it is a fact that it is well known to the Government that the provisions of the contract just quoted were adhered to in the most scrupulous manner from the time of the making of the contract to the time of the petition, and it is a fact that it is a matter of common knowledge that the prices of Mexican sisal for at least three years prior to the time of the petition were entirely moderate and thoroughly satisfactory to the independent buyers of Mexican sisal in the United States.

In all the allegations of the petition with reference to the contracts between the Eric Corporation and Hanson & Orth and between the Sisal Sales Corporation and the new Comision Reguladora there is not the slightest claim or intimation of monopoly or restraint of competition. The petition does divulge, however, a series of laws and decrees passed shortly thereafter in Mexico which, according to the very letter of the petition, establish the alleged monopoly.

Thus it is said that on December 13th, 1921, the State of Yucatan enacted a law imposing a production tax of 8 centavos (4 cents U. S. gold) per kilo. As to the operation of this law it is alleged (R., 15, Petition, pp. 29-30):

> "This tax, with a Mexican Federal surtax of 50 per cent., charged on all State taxes, made the total

> tax 12 cents Mexican (6 cents U. S. gold) per kilo. This tax was to be collected by the Yucatan State Treasurer, and paid to the new Comision Reguladora del Mercado de Henequen to be used by the latter in the regulation of the sisal market."

It is further alleged that another law was passed by the State of Yucatan on December 14th, 1921, "restricting the production of sisal from 15 to 50 per cent. less than the quantity then being produced." An English translation of this law is annexed to the petition as Exhibit F (R., 36).

These laws, however, of December 13th, 1921, and December 14th, 1921, did not produce a condition of monopoly.

On January 2nd, 1922, it is said that the State of Yucatan by decree changed the name of the new Comision Reguladora to "Comision Exportadora de Yucatan" and that (R., 18, Petition, p. 35):

> "On the same day the *State of Yuactan enacted a law exempting all sisal sold to the Comision Exportadora de Yucatan from the payment of a special state tax* imposed by the law of December 13, 1921." (Italics ours.)

It is further alleged that the Mexican Federal Government by a decree which became effective January 1st, 1922, reduced the Federal surtax on all state taxes from 50 per cent. to 25 per cent., thus making the discriminatory tax in favor of the Comision Exportadora amount to 8 cents Mexican plus 2 cents Mexican per kilo, or a total of 10 cents Mexican per kilo, which is equal to about 2¼ cents U. S. gold per pound.

The final step and the one effective thing which according to the petition itself was the immediate producing cause of the monopoly, was a further Act of the State

Government of Yucatan passed on March 7th, 1922, which imposed an additional special tax of 4 cents Mexican per kilo. The allegation with reference to this Act of March 7th, 1922, and its immediate result, is so important that we quote it in full (R., 18-19, Petition, pp. 36-37):

> *"Even after the Comision Exportadora de Yucatan began purchasing sisal on January 2, 1922, independent buyers continued to purchase,* paying the 2¼ cents U. S. gold per pound discriminatory tax. In order to completely insure against the further purchase of sisal in Yucatan by independent buyers, the State Government of Yucatan, on March 7, 1922, in pursuance of agreements made in the United States between Tomas Castellanos Acevedo and his associates and officials of the Sisal Sales Corporation, and as a result of the efforts on the part of the said Castellanos and his associates, imposed an additional special tax of 4 cents Mexican per kilo, which with the Mexican Federal surtax of 25 per cent. would amount to 5 cents Mexican per kilo (or about 1⅛ cents U. S. gold per pound), all sisal held by or delivered to the Comision Exportadora de Yucatan being exempted from such tax. An English translation of this law is annexed hereto, marked 'Exhibit H,' and prayed to be considered a part hereof.
>
> "This made the total discriminatory taxes in favor of the Comision Exportadora de Yucatan, including the Federal surtax of 25 per cent., amount to 15 cents Mexican per kilo (approximately 3⅜ cents U. S. gold per pound). *The immediate result was to put independent buyers out of business,* causing them to close their offices and return to the United States, thus perfecting a complete monopoly in Mexican sisal. Shortly thereafter the Comision Exportadora de Yucatan began paying the Yucatan producer 3½ cents per pound, instead of 4 cents per pound for sisal. Sisal was then being sold by

the Sisal Sales Corporation in the United States at 6¼ cents Gulf (6½ N. Y.) per pound." (Italics ours.)

Having thus alleged a conspiracy and combination to "arrange with persons in control of the Yucatan State Government" and others "to cause to be enacted in the Republic of Mexico or in the States of Yucatan and Campeche any laws or regulations necessary to create a monopoly of the sisal produced in said states"; and having alleged the carrying out of this conspiracy by the law of the State of Yucatan, dated July 16th, 1921, the law of the State of Yucatan, dated December 13th, 1921, the law of the State of Yucatan, dated December 14th, 1921, the decree of the State of Yucatan dated January 2nd, 1922, the decree of the Mexican Federal Government which became effective on January 1st, 1922, and, finally, the law of the State Government of Yucatan dated March 7th, 1922, by means of which enactments and decrees the monopoly is said to have been made effective, the balance of the petition is devoted to a statement of the results which were brought about by this particular alleged monopoly, in this particular alleged manner. These results were, of course, the sale through the Sisal Sales Corporation of the old stocks of sisal which had accumulated up to August, 1919, and thereafter, and the sale of all this sisal and fresh sisal, in addition, at prices arbitrarily fixed by the alleged monopolies.

(e) General Observations.

Before discussing the law which we believe to be applicable to this case, it will probably be helpful to again consider the exact differences between the contentions of the moving parties-respondents and those of the Government.

From the analysis just above made of the allegations of the petition it is our claim that the only conspiracy which is alleged is a conspiracy to cause to be enacted certain laws, proclamations and decrees which the sovereign Governments of the State of Yucatan and the Republic of Mexico had a perfectly lawful right to pass; that it has been the policy of our Courts under no circumstances to inquire into the legality, validity or good faith of such enactments, proclamations and decrees of a sovereign foreign government and that as the passing of these laws is consequently conclusively presumed to be lawful and proper it cannot be said that the defendants are guilty of any wrong, even if they did combine together and conspire to induce the doing of a lawful thing.

(f) The Utter Futility of Granting Any Injunctive Relief in This Case.

Another point of the greatest importance in an equity case of this kind should be mentioned, and it is summed up as follows in the opinion of the Court below (R., 54):

> "*An injunction* to restrain dealings with the Comision Exportadora de Yucatan and the Sisal Sales Corporation *would be quite futile*, so far as the public interest is concerned. Anyone else could surely deal with them and the successors to the alleged unlawful conspirators would have to be at once treated as legitimate traders and go scatheless." (Italics ours.)

The position of the Court below was of course quite proper. Even if it be assumed that these particular defendants, because of their alleged implication in connection with the passage of the long series of laws, proclamations and decrees of the sovereign State of Yucatan and the sovereign Republic of Mexico which have resulted in

the alleged monopoly and restraint of trade, are subject to the Court's decree, what possible good will come of a decree enjoining these particular defendants from acting as agents or otherwise cooperating with the officials of the State of Yucatan and the Republic of Mexico in carrying out the policies which have been declared by those Governments to be for the welfare and general benefit of Mexican citizens?

There is no law of this country now on the statute books by which the Court could enjoin any one or several of the millions of other American citizens and citizens of foreign countries who would at once step forward and willingly undertake the performance of the agency provisions of the contracts referred to in the petition.

Equity will not do a vain thing. And it seems apparent at the very outset that any decree in accordance with the prayer of the petition herein would be no more than a a mere futile gesticulation which, in result, could in no way affect the existence and continuance of the alleged monopoly and restraint of trade, but would serve the sole purpose of irritating sovereign foreign Governments with whom the United States is now upon friendly relations.

In view of the avowed policy of this Government to bend every effort to induce our own agriculturists to combine and cooperate together for their own collective benefit and in view of the many statutory provisions explicitly exempting our farmers and agriculturists from those laws which govern combinations and monopolies by others, is it possible that a decision in support of the petition herein can have any other effect upon the citizens and Government of the Republic of Mexico and the State of Yucatan than one of irritation and discomfiture?

ARGUMENT.

Summary.

The argument advanced in this brief reduces itself to an extremely simple one concerning the effect of a *foreign government* monopoly. The petition alleges a monopoly existing as the direct result of a series of enactments, proclamations and decrees of sovereign foreign governments without which nothing remains of the alleged conspiracy in this case. (1) A conspiracy to effect monopoly by means of enactments, proclamations and decrees of a sovereign *foreign government* is not within the scope of the anti-trust laws of the United States, and the decision in the *American Banana Co.* case, hereinafter referred to, is conclusive on this point. (2) Moreover, the question raised by the existence of the *foreign government* monopoly in this case is a broad *international, economic* and *political* one, and in so far as the United States conceives itself to be injured by such monopoly, *the remedy,* under our present nationalistic form of political government and under the constitutional form of government of the United States, *should not be attempted by the courts* but by the executive and legislative departments of the United States.

FIRST POINT.

A conspiracy to effect a monopoly by means of enactments, proclamations and decrees of a sovereign foreign government is not within the scope of the anti-trust laws of the United States. The decision in American Banana Co. v. United Fruit Co., 213 U. S. 347, is conclusive on this point.

The principles governing the decision by this Court in the *American Banana Co.* case are identical with those controlling here. The conspiracy of American citizens in the United States was carried out by means of a series of acts of soldiers and officials of Costa Rica which were plain acts of sovereignty. There were the same allegations of intent and combination to monopolize and the defendant was alleged to have effected the monopoly by means of acts of the most fraudulent and improper character, consummated by soldiers and officials of Costa Rica.

The action was for treble damages under Section 7 of the Sherman Act, thus involving monopoly and conspiracy to restrain trade identical with the requirements of the statute in reference to the present suit for injunctive relief.

An examination of the argument of counsel for the plaintiff which is summarized at pages 348-351 of the report of the *American Banana Co.* case discloses that the argument there advanced is identical with that urged in the Government's brief herein.

Thus, citing *Gibbons* v. *Ogden*, 9 Wheat. 1 and *United States* v. *Knight*, 156 U. S. 1, it was argued (p. 351):

> "The statute applies to acts done in a foreign country. The objection that the acts complained of were done abroad is entitled to no weight. The

> parties to the suit are American citizens. The commerce restrained by defendant's acts was foreign commerce of the United States. Congress has full power to legislate in respect to that and has exercised the power in this statute."

And again (p. 349):

> "The acts complained of were done in violation of an express statute of the United States. Costa Rica cannot give immunity to defendant for this offense, nor can exceptions be read into the Sherman Act not expressed in the act itself."

This Court, however, flatly repudiated this argument in every particular and held that the complaint had been properly dismissed. Mr. Justice HOLMES proceeded to state the grounds of the decision as follows (pp. 358-9):

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a non-conductor and to bar responsibility, *Allen* v. *Flood* (1898) A. C. 1, 121, 151, etc., but it is not clear that this is always true, for instance, in the case of the privileged repetition of a slander, *Elmer* v. *Fessenden*, 151 Massachusetts, 359, 362, 363, or the malicious and unjustified persuasion to discharge from employment, *Moran* v. *Dunphy*, 177 Massachusetts, 485, 487. *The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes*

the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law. See *Kwananakoa* v. *Polybank*, 205 U. S. 349, 353. In the case of private persons it consistently may assert the freedom of the immediate parties to an injury and yet declare that certain persuasions addressed to them are wrong. See *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, 16-21; *Fletcher* v. *Peck*, 6 Cranch 87, 130, 131. • • •

"The acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government and must be taken to have been done by its order. It ratified them, at all events, and adopts and keeps the possession taken by them; *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45, 52; *The Paquet Habana*, 189 U. S. 453, 465; *Dempsey* v. *Chambers*, 154 Massachusetts 330, 332. The injuries to the plantation and supplies seem to have been the direct effect of the acts of the Costa Rican government, which is holding them under an adverse claim of right. The claim for them must fall with the claim for being deprived of the use and profits of the place. As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the act of Congress and discloses nothing that we can suppose to have been a tort where it was done. *A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.*" (Italics ours.)

The decision thus solemnly made by this Court in no sense created new doctrine, but merely reaffirmed a thoroughly well settled and fundamental principle of interna-

tional comity. Indeed, it is obvious that international relations would be greatly prejudiced and disrupted were the Courts of one nation permitted to inquire into the validity and legality of the laws of another sovereign state. It is also significant that every Federal judge participating in the *American Banana Co.* case ruled against the plaintiff. Judge HOUGH, then District Judge of the Southern District of New York, so ruled (160 Fed. 184); the three Judges of the Circuit Court of Appeals of the Second Circuit (LACOMBE, COXE and NOYES) so ruled (166 Fed. 261); and there was not a single dissenting vote in this Court. A careful scrutiny of the opinions of these distinguished jurists will indicate beyond possibility of serious doubt that the principles therein stated govern the present case.

The only difference between this case and the *American Banana Co.* case is that here the various enactments, proclamations and decrees of the Republic of Mexico and the State of Yucatan were openly made in obvious good faith and for the salutary purpose of affording some protection to Mexican agriculturists, whereas in the *American Banana Co.* case there was every indication of fraudulent and improper acts of violence.

As to questions with respect to such laws of a sister nation, which may be considered to adversely affect the economic or other interests of American citizens, the Court of Appeals of the State of New York recently said in *Wulfsohn* v. *Russian Republic*, 234 N. Y., 372, 376:

> "The question is a political one, not confided to the courts but to another department of government. Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war."

As the Court may wish to inquire further into the question of the reasons underlying the rule above stated we have collected some of the leading cases which are as follows:

Underhill v. *Hernandez*, 65 Fed. 577, aff'd. 168 U. S. 251;
Oetjen v. *Central Leather Co.*, 246 U. S. 304;
Ricaud v. *American Metal Co.* 246 U. S. 297;
Hewitt v. *Speyer*, 250 Fed. 367;
The Invincible, Fed Cas. No. 7054;
Earn Line S. S. Co. v. *Sutherland S. S. Co.*, 254 Fed. 126;
The Adriatic, 258 Fed. 902.

The English decisions are to the same effect:

Duke of Brunswick v. *King of Hanover*, 2 H. L. Cases, 1;
Secretary of State v. *Kamachee*, 13 Moore (Privy Council), 22;
Buron v. *Denman*, 2 Exc. 167;
Doss v. *Secretary of State*, L. R. 19 Eq. 509.

The attempted distinction between the *American Banana Co.* case and the present case, which appears in Point III, page 22, of the Government's brief, falls of its own weight. It is apparent from a mere reading of that case and the petition in the present case that the two cases are entirely parallel and that there is no distinction whatsoever between them.

The method of argumentation pursued by the Government in this connection is the familiar and well-worn but entirely fallacious one of setting up certain alleged differences in fact which, even if true, have no bearing on

the application of the fundamental principle of the *American Banana Co.* case.

The first attempted distinction is between a tort action or an action for treble damages under Section 7 of the Sherman Act, which was the section under which the complaint in the *American Banana Co.* case was drawn, on the one hand, and Section 4 of the Sherman Act, which covers proceedings in equity for injunctive relief, on the other hand. There is in fact no possible basis for any such distinction, as all the sections of the Sherman Act patently apply to the same sort of conspiracy, contract or combination to monopolize or restrain domestic or foreign commerce.

The second attempted distinction is between a conspiracy aimed at production only and a conspiracy aimed at other essential elements of interstate commerce. The fundamental principle of the *American Banana Co.* case, concerning the lawfulness of the acts of a sovereign foreign government including the lawfulness of a foreign government monopoly, is, however, equally applicable to this case.

The third alleged distinction is between a conspiracy in a foreign country and a conspiracy in this country. This distinction attempts to introduce elements which have no relevancy whatsoever to the essential question involved in this case, as to the effect of the foreign government monopoly. Not only were the monopoly and the acts relating thereto in the foreign country the heart and soul of the transaction attacked by the petition in this case, but the assumption that the *American Banana Co.* case does not apply to a conspiracy in this country is entirely erroneous. This is completely demonstrated by the following statement of Mr. Justice HOLMES in the *American Banana Co.* case:

> "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."

In conclusion, it may be said that the significant and vital portion of the opinion by this Court in the *American Banana Co.* case, just above quoted, is not discussed with any substance in the Government's brief or at all aside from the casual reference at page 20, although it is the very heart and soul of the decision and it is the particular portion thereof which makes the *American Banana Co.* case and this case as alike as two peas in a pod.

SECOND POINT.

The question raised by the existence of the foreign government monopoly in this case is a broad international, economic and political one, and in so far as the United States conceives itself to be injured by such monopoly, the remedy, under the constitutional form of government of the United States, should not be attempted by the Courts but by the executive and legislative departments.

We have thus far argued the question involved on this appeal from a purely technical and legalistic standpoint. We should not feel, however, that we had performed our full duty to the Court and to the parties whom we represent should we fail to briefly discuss a much more fundamental and far-reaching proposition which is necessarily involved. While the Government brief would make it appear that the case has little or no bearing upon the acts of sovereign foreign govern-

ments and states, the true situation as it appears to us necessarily involves international relations and international controversies. This is in point of fact the most serious side of the situation presented to this Court in the present record. That the Government appreciates this to be the case is forcibly demonstrated by the discussion of the German Government monopoly in potash on pages 30-32, inclusive, of the Government brief.

Not infrequently have the courts, and particularly this Court, been called upon to determine momentous questions involving fundamental principles of a social, economic or political nature in connection with which it must be proper, as appears by the reference in the Government brief to the German potash monopoly, to refer to the well-known and commonly understood facts bearing upon the situation or question involved.

A. Government monopolies common today.

The foreign government monopoly of the kind involved in this case is only one of the many government monoplies that exist today, and the existence of such monopolies and the likelihood of their increase has created an international, economic and political problem, which is now the subject of public discussion and upon which a representative *committee of the United States Congress* has already taken a position of watchful waiting, further referred to below.

The monopoly involved in this case happens to be a monopoly in sisal created by sovereign state governments in Yucatan and Mexico.

This government monopoly of sisal was investigated by the Committee on Interstate and Foreign Commerce of the House of Representatives, 69th Congress, First Session, in the Committee's hearings on H. Res. 59. The printed re-

port of these hearings constitutes a government document published in 1926 (hereinafted referred to as the "Hearings"). The resolution under which these hearings were conducted reads as follows (Hearings, p. 1):

> "*Resolved*, That the Committee on Interstate and Foreign Commerce be, and it is hereby, authorized and empowered to investigate, by subcommittee or otherwise, the means and methods of the control of production and exportation of crude rubber, coffee, silk, nitrates, potash, quinine, iodine, tin, sisal, quicksilver, pulp wood, and other important raw materials, and their effects upon the commerce of the United States, both as to supply and to price, and to report to the House its findings and recommendations thereon; said committee shall have leave to report at any time on the matters herein stated in one or more reports."

As indicated in such resolution, the hearings revealed that there exist today many foreign government monopolies of exactly the same character as the sisal monopoly involved in the present case, and it is of the greatest importance to note that such monopolies have been created by some of the greatest and most powerful independent sovereign states in the world. Thus government monopolies exist with respect to

(1) Rubber, created by Great Britain (Hearings, pp. 7, 20).

(2) Potash, created by France and Germany (Hearings, p. 31).

(3) Coffee, created by the State of São Paulo in Brazil (Hearings, p. 23).

(4) Nitrates, created by Chile (Hearings, p. 30).

(5) Iodine, created by Chile (Hearings, p. 31).

(6) Long staple cotton, created by Egypt (Hearings, p. 27).

(7) Camphor, created by Japan (Hearings, p. 32).

(8) Silk, at times created by Japan (Hearings, p. 29).

Aside from the long list just presented apparently the end of these government monopolies is not yet. This is brought out in the Preliminary Report on crude rubber, coffee, etc., dated March 13, 1926, made by the Committee on Interstate and Foreign Commerce pursuant to H. Res. 59, and entitled "House Calendar No. 132, 69th Congress, 1st Session, Report No. 555" (hereinafter referred to as the "House Report"). That report points out that the tendency to further develop such government monopolies is illustrated by the government of New Zealand in connection with kauri gum, which is an important ingredient in varnishes, the monopoly in which went into effect last year (House Report, p. 2). Moreover (House Report, p. 4):

> "There are some 70 other vital commodities which could be controlled by action of foreign Governments and which the United States does not produce in sufficient quantities to satisfy its requirements."

To further illustrate the state of the present important government monopolies the following table has been prepared showing the important products and countries which are involved in such government monopolies.

Commodity	*Where Produced*	*Government*	*Monopoly Plan*	*Monopoly Method*
(1) Rubber	Borneo, Sumatra, Ceylon, Malayasia, New Guinea	British	Stevenson Plan (Brit. Gov.) applying to all Brit. Malay and Ceylon	Prohibitive export tax on all rubber shipped in excess of a fixed "allowance"
(2) Potash	Germany France	German French	Government monopoly	French and German Gov. monopolies act in concord to form a "monopolistic unit"
(3) Tin	Brit. Malayasia Dutch E. Indies Bolivia	British Dutch Bolivian	Alleged political or private monopolistic control in all three places	Malay states place prohibitive tax on all exports to other than Brit. ports. Holland exercises Gov. ownership and restricted production
(4) Mercury	Italy Spain	Italian Spanish	No monopoly. Production controlled by Gov.	Italy places no restriction on exports. No monopolistic policy in Spain in spite of ability to exert one.
(5) Quinine	Java	Dutch	Combination between Javanese Planters & Dutch Mfgrs. controlling price on 90% of production	Stabilization of production and prices.
(6) Quebracho	Argentina	Argentine	"La Forestal"	Private Co. controlling 50% of production
(7) Coffee	Sao Paulo	Brazilian	"Permanent Institute in Defense of Coffee"	Gov. finance and purchase of coffee which is held for good market. Taxes
(8) Nitrates	Chile	Chilean	"Nitrate Producers Ass'n" of which two American companies are not members	20% export tax. Industry under Brit. financial and Chilean political control
(9) Iodine	Chile	Chilean	"Combinacion de Yodo"	Combination operates under Gov. deed or contract and controls production
(10) Sisal	Yucatan	Mexican	"Asociacion Co-operativa de Henequeneros de Yucatan"	Planters forced to sell to Gov. monopoly thru prohibition taxes
(11) { Grain Cotton Tobacco }	United States	United States	"McNary-Haugen Farm Relief Bill"	Equalization Tax

As indicated in such table, the tendency to create these government monopolies has become so great that even the United States itself has made a very determined effort to create one by the recent McNary-Haugen Bill (Senate Bill 4808), which, no matter what intelligent and informed people may think thereof, has nevertheless passed both Houses of the United States Congress and has possibility either in its present or some similar form of becoming law in this country in the future. The McNary-Haugen Bill in substance attempts to creat a monopoly with respect to cotton, corn, rice, swine, tobacco and wheat very similar to that involved in the present case. The character of the bill in this connection is clearly set forth in the veto message of the President, where he speaks as follows:

> "The bill upholds as ideals of American farming the men who grow cotton, corn, rice, swine, tobacco or wheat, and nothing else.
>
> * * *
>
> "Clearly this legislation involves governmental fixing of prices. It gives the proposed Federal board almost unlimited authority to fix prices on the designated commodities. This is price fixing, furthermore, on some of the nation's basic foods and materials. Nothing is more certain than that such price fixing would upset the normal exchange relationships existing in the open market and that it would finally have to be extended to cover a multitude of other goods and services. Government price fixing, once started, has alike no justice and no end. It is an economic folly from which this country has every right to be spared.
>
> * * *
>
> "It is not so long since the government was spending vast sums and through the Department of Justice exerting every effort to break up com-

binations that were raising the cost of living to a point conceived to be excessive. This bill, if it accomplishes its purpose, will raise the price of the specified agricultural commodities to the highest possible point and in doing so that board will operate without any restraints imposed by the antitrust laws. The granting of any such arbitrary power to a government board is to run counter to our traditions, the philosophy of our government, the spirit of our institutions and all principles of equity.

* * *

"Several of our foreign markets have agriculture of their own to protect and they have laws in force which may be applied to dumping and we may expect reprisals from them against dumping agricultural products which will even more diminish our foreign markets.

"The bill is essentially a price-fixing bill.

* * *

"While the government is not directly buying or selling these commodities, it must under this bill let contracts for others to do so and name therein the terms upon which they shall buy and sell. No matter how disguised, this in plain terms is government buying and selling of commodities through agents."

The significance of the various data which have been referred to lies in this fact, namely, that the monopoly involved in the present case exists by virtue not of a combination between a number of private individuals, which is the kind of combination aimed at by our antitrust laws, but in the natural fact of the territorial location of the product involved, which gives the particular sovereign government controlling such territory the legal power to create a monopoly with respect to such product. This is clearly brought out by the following description

of the character of the government monopolies contained in the House Report (p. 2):

> "All of the controls specifically referred to have certain common characteristics in that—
>
> "(a) *They are all confined to commodities where the preponderating production lies in the country mentioned.* For example, the British possessions produce 69 per cent. of the world's rubber, Brazil 65 per cent. of the world's coffee, and Chile 100 per cent. of the world's natural nitrates.
>
> "(b) They are confined to commodities where the consumption within the country of origin is in small ratio to the consumption in other countries. For instance, 5 per cent. of the world's coffee is consumed in Brazil and 7 per cent. of the world's rubber is consumed in the United Kingdom. Only a small per cent. of the nitrate or iodine production is consumed in Chile, and so on.
>
> "(c) Of rubber, nitrates, iodine, sisal, coffee, raw silk, and camphor the United States consumes nearly half, and in some cases almost 75 per cent. of the entire world's production.
>
> "(d) *These controls are largely exercised through governmental limitation of exports or of output imposed upon each producer or dealer.*
>
> "(e) They are all stated to be for the purpose of stabilizing the price for the mutual benefit of the producer and consumer.
>
> "(f) All of them have maintained or brought about prices highly profitable to their producers and some of them have from time to time advanced prices to exorbitant levels." (Italics ours.)

As an illustration of the extensive public discussion existing at the present time with respect to such govern-

ment monopolies and the intricacies of the economic and political problem involved therein, the following quotation from an address and article by a prominent writer and publicist, Mr. Horace J. Bridges, may be referred to. In speaking on "The Debt Problem, and the European Feeling Toward America" (13 The Standard, for Dec., 1926, pp. 110, 117), he said:

> "* * * for our own part, we should wish to make cancellation conditional upon serious reduction of armaments, and the acceptance of binding commitments against war. We should also, I think, utilize it to secure *international* co-operation in *fields of policy* which, when pursued solely by individual nations in their own interest, cause much hard feeling and inconvenience. *I refer to the restriction of production and the withholding of commodities from the market in order to raise or maintain prices, practised of late years in regard to rubber, coffee, and other goods,* and now contemplated by ourselves in regard to cotton and wheat." (Italics ours.)

B. The remedy against injurious foreign government monopolies.

By virtue, therefore, of the very nature and character of such foreign government monopolies, it follows that if the United States feels aggrieved at any particular foreign government monopoly, the way to remedy any conceived injury is the way the United States would remedy any other alleged economic or political injury by such foreign government; and that way between co-sovereign national states is naturally, aside from the economic boycott and other remedies of private citizens, by *diplomacy* and the other usual methods adopted by a soverign na-

tional government for settling international disputes (see House Report, pp. 13, 17 and 22).

This is clearly indicated by the House Report where it points out the way in which a foreign government monopoly results in a dispute between two countries. The report states (House Report, p. 3):

> "This entry of foreign governments into the business and control of trading and the consequent rise in price at once compels consumers of such commodities to deal directly or indirectly with foreign governmental authorities and sooner or later *our citizens are forced to demand that their Government assist in these negotiations.* This projects the Government of both parties into business in large issues. *As a result the complaints of consumers* of such controlled commodities throughout the world regarding real or fancied wrongs in prices, supplies, and other trading conditions *become matters of governmental policy and concern and consequently stir international ill-will. In fact, through these processes trading is being* taken from the market places and *encumbered with the formalities and far reaching, serious consequences of international relations* with an inevitable harmful effect to the world." (Italics ours.)

It will, of course, be noted that such quotation points out that the dispute raises matters of "governmental *policy*" (italics ours). As a matter of illustration of the way in which foreign government monopolies raise international questions, two of the most important of such monopolies may be referred to, namely, the rubber monopoly of Great Britain and the potash monopoly of France and Germany.

With respect to the rubber monopoly of Great Britain, the House Report shows clearly the resort to *diplomatic*

and other aid of the Executive Department of the United States Government to secure a remedy in the past. Such report states (House Report, p. 3):

> "An immediately effective remedy against price exactions has been demonstrated in the power of the American consumer to decrease demand as recently accomplished in the case of rubber. Emphatic complaints of American users of rubber goods, particularly tires, began to reach the Department of Commerce in the latter part of 1925. Since *both official and unofficial representations to the British Government had brought no relief, the Secretary of Commerce advised the complainants and the public generally to reduce their demand* for rubber by using substitutes and by extracting a greater measure of service from all rubber articles through using them properly and repairing them promptly." (Italics ours.)

Further data concerning such rubber monopoly and illustrating the proposition here made with respect thereto is contained in the following material:

The Bulletin of the Rubber Growers Association, Inc., Vol. 4, No. 11, November, 1922 (containing the Ceylon and Malaya ordinances restricting the export of rubber).

The Literary Digest for February 10, 1923 (containing an article on the British-American Rubber Conflict).

Foreign Affairs for June 15, 1924 (containing an article entitled "The Crude Rubber Supply: An International Problem," by Harry N. Whitford).

Harvard Business Review (Vol. II, No. 2, January, 1924 (containing an article on "The Evolution of the World Rubber Situation" by H. Stuart Hotchkiss).

Special Circular, No. 95, Department of Commerce, Bureau of Foreign and Domestic Commerce, Rubber Division, Washington (containing the Stevenson's Committee's Supplementary Report, quoting from the India-Rubber Journal of October 14, 1922).

The Report and the Supplementary Report of the Committee appointed by the Secretary of State for the Colonies to investigate and report upon the rubber situation in British Colonies and Protectories (the official reports published by his Majesty's Stationery Office).

The Commercial & Financial Chronicle, Vol. 113, Part I, July-September, 1921, pp. 692-803, (containing an original plan of the Rubber Growers Association to form a corporation to restrict the output and prices of rubber and the criticisms and advantages of such plan).

With respect to the potash monopoly of Germany and France, the situation has become the subject of a special report on "Potash—Significance of Foreign Control and Economic Need of Domestic Development" prepared and published in 1926 under the auspices of the Department of Commerce, Bureau of Foreign and Domestic Commerce, by H. M. Hoar of such Bureau, and C. C. Concannon, Chief of the Chemical Division. There is a very revealing section in this pamphlet on the resort to *diplomatic* measures as a means of dealing with the German potash monopoly in one of its earlier phases. Thus it is said, at pages 12-13 and 16:

> "In December, 1909, the syndicate carried out its threat of governmental interference by introducing a bill into the Bundesrath that would have invalidated all the American potash contracts, as well as constituted a practical repudiation of them.
>
> * * * * * * *

"Nevertheless, negotiations continued * * * until the following December, when the United State was negotiating with various countries regarding the application of the maximum and minimum schedules of its new tariff law. Germany, of course, wanted the minimum or 'most-favored-nation' schedule, and, unquestionably, America desired reasonably priced potash. *Assurances were conveyed to our Government* that nothing would be done that could impair the validity of existing contracts and, on these assurances, Germany was given the benefit of the minimum schedule of the Payne-Aldrich Tariff Act.

"*Through diplomatic relations the much-advertised potash bill was withdrawn.* But on February 4, 1910, a new potash law was brought before the Reichstag by the federal council.

* * * * * * *

"Judging from the Reichstag discussions, it was now clear that Germany contemplated legislation along this line, but *notwithstanding the most emphatic protests of the United States Government*, American fertilizer interest and the Schmidtmanns, the Imperial Government finally, on May 25, 1910, enacted a potash law which was promulgated and went into effect three days later." (Italics ours.)

Since, therefore, the question raised by such a foreign government monopoly is a question of governmental *policy* and since the proper branch of the United States Government, under our constitutional system, to determine such governmental policy and to obtain any remedy that may be necessary under the circumstances is the Executive Department so far as diplomatic measures are necessary and the Legislative Department so far as legislative measures are necessary, it follows that the courts of the United States should not attempt to interfere and complicate the questions involved by any decree such as

that asked for in the present case, which certainly cannot destroy the foreign government monopoly and can have no other effect than to possibly complicate an international situation. For the courts to attempt such a remedy would be nothing short of usurpation of executive and legislative functions, which is contrary to the theory and policy of this Court and our constitutional system.

In *Gordon* v. *United States*, 117 U. S. 697, Chief Justice TANEY, speaking for the Court, said at pages 699, 700:

> "It [the Supreme Court] is created by the Constitution, and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent to the other in performing its appropriate functions. *The power conferred on this Court is exclusively judicial, and it cannot be required or authorized to exercise any other.*" (Italics ours.)

See also,

Muskrat v. *United States*, 219 U. S. 346.

This general rule has been applied when this Court was called upon to pass on questions of a political character.

Pacific Telephone Co. v. *Oregon*, 223 U. S. 118;
Kiernan v. *Portland, Ore.*, 223 U. S. 151.

It needs no further citation of authority to show that the courts will not violate the fundamental principle of separation of powers implicit in our Constitution and will not attempt to destroy a monopoly created by a foreign government, which is not and cannot be a party before the Court, in which case, therefore, any such attempt will be merely a futile gesture. The House Report makes this

perfectly plain when, in describing the problem here involved and the nature of the remedies which are applicable thereto, it leaves out of consideration completely any suggestion that the courts of this country can affect such foreign government monopolies. The Report states (House Report, p. 13):

> "The problem of remedies is indeed most difficult. *These governmental controls violate economic principles.* They stifle the growth of producing industries and stimulate the use of inferior substitutes among consumers. *Furthermore, they violate other than economic principles. Their disturbing influence upon international good will* cannot be overlooked and *is, in fact, one of the most important objections to them.* The friendly intercourse of nations would be better and more soundly based if these controls were wholly abolished. We commend the *efforts our Government has made* to induce an abolishment of those controls and urge renewed watchfulness and continued endeavor to accomplish that result.
>
> "If we consider the problem wholly from the point of view of domestic correctives, we have four alternative remedies:
>
> "The first is to secure immediate relief from high prices by conservation and substitution campaigns among our consumers, such as the very successful rubber conservation campaign for which the Department of Commerce is responsible.
>
> "The second is by *governmental* and private *action* to create an independent source of supply which cannot be brought under foreign control.
>
> "The third is for American citizens to refuse to furnish credit to these controls.
>
> "The fourth is direct retaliation in some form." (Italics ours.)

C. Conclusion.

That the problem here involved is an international economic and political one and that so far as the United States is concerned it depends for its solution on the adoption of a national *policy* by the United States, which means by those departments of the United States charged with the duty of determining such policy and not the judicial department, are propositions made conclusively apparent by the following opening remarks of the *Secretary of Commerce, Mr. Hoover,* in the hearings before the House Committee last year, already referred to. Mr. Hoover there said (Hearings, p. 2):

> "I am glad that Congress has seen fit to take this question up in a serious fashion. *It is one of very great importance to the country.* It is one in which the Department of Commerce has been very deeply interested. It is a subject very difficult to strip of its nonessentials, and it is, indeed, important that we should get to the fundamentals in a problem that is of vast importance, such as an investigation of this kind will enable us to do. *It is important that we handle the subject without arousing national prejudice.*
>
> "In undertaking an investigation into the growth and conduct of foreign controls of price and distribution of our import raw materials, *your committee has entered upon a problem of great gravity* not only to ourselves but *to the world as a whole. The issue* before you is much broader than the price of a particular commodity which may be at the moment vividly in the public mind; it *involves the whole policy that our country shall pursue toward a comparatively new and growing menace in international commerce and relations. This development* threatens not only the sane progress of the world but *contains in it great dangers to international good will.*

"The world has often enough seen attempts to set up *private* monopolies, but *it is not until recent years that we have seen governments revive a long-forgotten relic* of medievalism and of war-time expediency *by deliberately erecting official controls of trade in raw materials of which their nationals produce a major portion of the world's supply,* and through these controls arbitrarily fixing prices to all of the hundreds of millions of other people in the world. *It is this intrusion of governments into trading operations on a vast scale that raises a host of new dangers—the inevitable aftermath of any such efforts by political agencies to interfere with the normal processes of supply and demand.* Our experience of the last 12 months with these controls has developed a series of fundamental questions which we can no longer ignore and upon which *we must determine a national policy.* These questions not only concern our own welfare, but also the welfare of consumers in 50 or more nations.

"We can not solve these by acquiescence or acceptance and we will only compound and aggravate them by retaliatory action. On the other hand, if we are able to evolve the basis for a broad constructive solution *I believe we shall also make an important practical contribution to the promotion of stable international relationships.*" (Italics ours.)

In other words, we are faced here with an economic and political question of international proportions which, because there are national governments involved on opposite sides of the question, cannot be settled by the acts of the courts of one of such governments alone acting against private individuals merely and not against the foreign national government.

THIRD POINT.

If there be anything in the Government's contention that the pooling of the stocks of stored sisal held by the Eric Corporation with the stocks of stored sisal held by the Comision Reguladora constitutes a violation of the anti-trust laws, it is clear that the defendants Hanson & Orth are in no way involved in this alleged pooling of stocks.

We do not believe that the petition alleges or purports to allege any conspiracy other than the conspiracy to bring about a monopoly and restraint of trade by means of causing certain enactments, proclamations and decrees to be promulgated and made effective by the Government of the State of Yucatan and the Government of the Republic of Mexico.

As the Government's brief apparently urges the point (Government's Brief, p. 2, sub-paragraph "[b]") that the pooling of the stocks of sisal held by the Eric Corporation with those held by the Comision Reguladora is of itself an act in restraint of trade which in some unexplained way gives the courts jurisdiction to award injunctive relief, in spite of the fact that it appears on the face of the petition that the old stocks of stored sisal have long since been disposed of, it is well to bear in mind that all the acts of the other defendants with reference to the pooling of these stocks of stored sisal were consummated and completed long before Hanson & Orth or any of the members of that firm had any connection with the matters set forth in the petition.

The alleged pooling of these stocks is said to have taken place by contract between the Eric Corporation and the Comision Reguladora, dated January 23rd, 1920 (R., 9-10, Petition, pp. 18-19). It was not until May 1st, 1921,

that Hanson & Orth or any of the members of that firm are said to have had any connection whatsoever with this matter (R., 12, Petition, pp. 22-3).

LAST POINT.

The order of the Court below granting the motion of Hanson & Orth, Charles D. Orth, Michael J. Smith and Charles D. Orth, Jr., to dismiss the petition, should be affirmed.

Dated, New York City, March 2, 1927.

Respectfully submitted,

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HAROLD R. MEDINA,
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On the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1926.

The United States of America, Appellant, *vs.* Sisal Sales Corporation, Charles D. Orth, Alvin W. Krech, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[May 16, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

The United States seek an injunction to prevent appellees from taking further action in pursuance of a contract, combination or conspiracy said to be forbidden by the Sherman Anti-trust Act and the Wilson Tariff Act as amended, c. 647, 26 Stat. 209; c. 349, 28 Stat. 509, 570; c. 40, 37 Stat. 667. The trial court regarded *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, as controlling; held that no cause of action had been alleged; and dismissed the bill upon motion.

The bill is confused, difficult to follow, and an excellent example of bad pleading. An order should direct that it be recast and conformed to the established rules. Courts ought not to be burdened by rambling and obscure statements. Nevertheless, we think enough is alleged to indicate a meritorious cause and to require reversal of the judgment below.

Appellees are three banking corporations doing business at New York and New Orleans; two Delaware corporations—The Eric and the Sisal Sales—organized to deal in sisal; a Mexican corporation—Comision Exportadora de Yucatan—which buys sisal from the producers; certain officers and agents of the foregoing corporations; and members of Hanson and Orth, brokers.

Sisal is the fiber of the henequen plant, a native of Mexico, and from it is fabricated more than eighty per centum of the binder twine used for harvesting our grain crops. The annual requirements of the United States are from two hundred and fifty to